

August 23, 2010

10:00 a.m.

Deposition of FRED KLEIN, held at
the offices of Grandinette & Serio, LLP,
114 Old Country Road, Suite 420, Mineola,
New York, pursuant to Notice, before
Jean V. Gafa, a Notary Public of the
State of New York.



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2 STIPULATIONS
3

4 IT IS HEREBY STIPULATED AND AGREED by and
5 between the attorneys for the respective
6 parties hereto, that filing, sealing, and
7 certifications are hereby waived;

8 IT IS FURTHER STIPULATED AND AGREED that
9 all objections, except as to the form of the
10 question, shall be reserved to the time of
11 the trial;

12 IT IS FURTHER STIPULATED AND AGREED that
13 the within Deposition may be signed before
14 any Notary Public with the same force and
15 effect as though subscribed and sworn to
16 before this Court.
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F R E D K L E I N , called as a witness, having been duly sworn by a Notary Public, was examined and testified as follows:

EXAMINATION BY

MR. SCHECK:

(Time noted: 10:08 a.m.)

MR. SCHECK: I think we should put on the record first that Mr. Klein has to get out of the here at 4:30 because he has a lecture to give at Hofstra. So I'm totally sympathetic with that, and if we can't finish, we'll reschedule.

There's also the matter of the production of the DA's file, and we would certainly want to keep this deposition open until we've finally gotten closure on the issue of the District Attorney's files and productions that are being made of that.

Is that right?

MR. FREEMAN: I wouldn't call it productions being made of that, but there's productions that still have to be



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2 made, and that production may include
3 productions from the DA's files,
4 including productions you picked out, but
5 I agree that the deposition will be kept
6 open until production is made and you've
7 had a chance to review it.

8 I don't know how long you're going
9 to be, but I've cross noticed, and I
10 would like to ask Mr. Klein some
11 questions when you're done; and that
12 could be today and it could be a
13 different day.

14 MR. SCHECK: You're going to take
15 some time, I'm sure.

16 MR. GRANDINETTE: When you use the
17 words "picked out," could you discuss
18 what you mean?

19 MR. FREEMAN: Yes. It's my
20 understanding that before I was involved
21 in the case, the Plaintiffs' attorneys
22 had an opportunity to visit the County
23 Attorney's Office and go through what's
24 now being called the "DA's file."

25 My understanding, and somebody will



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correct me I'm wrong, is that the
Plaintiffs' counsel picked out documents
from that universe and copied them and
that satisfied the Defendants' obligation
to produce District Attorney's documents.
That's what I meant.

MR. GRANDINETTE: Okay.

MR. SCHECK: I think the
implication is that one of the issues
that's come forward, and I'll go over
with Mr. Klein today for sure --

MR. FREEMAN: Should he remain here
for this?

MR. SCHECK: Yes. I mean, there's
documents in the homicide file we're
alleging were not in the District
Attorney's files, the one that was
produced to us.

So you're not saying, just to be
clear on the record, there's certain
documents that we selected from the
homicide file.

MR. FREEMAN: No, I wasn't talking
about that.



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2 MR. FERGUSON: This has all been
3 addressed at length in motion papers
4 submitted to the Court under a formation
5 motion, and we answered and then
6 explained everything about the files at
7 that time; and we went to great length,
8 and I think that the reason I'm bringing
9 it up is I think the Magistrate allowed
10 you or asked you if you wanted to
11 withdraw that motion.

12 And I think your answer was yes.
13 So that motion, I guess, is technically
14 out there in limbo somewhere, but it's
15 all explained in great length in those
16 papers.

17 MR. GRANDINETTE: I just wanted to
18 make sure that it's clear when we were
19 talking about selecting certain
20 documents, we're talking about a review
21 of documents by myself, as well as a
22 representative of Mr. Scheck's office, in
23 which we identified certain documents,
24 and, you're right, there has been a
25 motion on that issue, but I wanted to be



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2 sure we're talking about the same date,
3 time, and place and the same references.

4 MR. FREEMAN: Correct.

5 MR. SCHECK: Are we ready to go?

6 THE WITNESS: Yes, sir.

7 MR. SCHECK:

8 Q. Mr. Klein, could you just tell us
9 something about where you're from and
10 something about your educational background?

11 A. I was born in Nassau County.
12 Actually, I withdraw that right away.

13 I was born in New York City. My family
14 later moved to Nassau County.

15 Q. I'm glad you made that distinction?

16 A. I went to College at American
17 University in Washington, DC. I went to law
18 school at George Washington University in
19 Washington, DC.

20 I was in private practice in Washington
21 and Maryland for four years.

22 Q. What were you doing there?

23 A. For two and a half years, I worked
24 for large firms in antitrust work. Then I
25 worked for small suburban litigation firms



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2 doing corporate litigation.

3 In 1979, I became an Assistant DA in
4 Nassau County, August 13th, 1979, and I
5 remained an Assistant DA in Nassau until
6 August 13th, 2006. I then went, spent three
7 years with the New York State Attorney
8 General's Office and retired from the State
9 in 2009, August, and I've also been teaching
10 at Hofstra Law School.

11 Q. I'll give you what's previously
12 been marked as Exhibit 71, which is a copy of
13 the transcript of the dismissal hearing.

14 You remember this hearing, do you not,
15 Mr. Klein?

16 A. Yes.

17 Q. And this took place on
18 December 29th, 2005 in front of Judge
19 De Nino?

20 A. Yes.

21 Q. And I thought maybe we would just
22 review what you said here as a way of getting
23 into the issues. So calling your attention
24 first to page three, line six, it says that
25 you say at this hearing, "I have been



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2 assigned to this prosecution since the spring
3 of 1985."

4 We're talking here about the prosecutions
5 of John Restivo and Dennis Halstead, correct?

6 A. Yes.

7 Q. And that's the subject of this
8 proceeding?

9 A. Okay, this doesn't involve
10 Mr. Kogut?

11 Q. No. All I'm saying is this. This
12 is a transcript of the proceeding where you
13 dismissed the cases against Mr. Restivo and
14 Mr. Halstead. When it says here, I've been
15 assigned to this prosecution since the Spring
16 of 1985, this prosecution was Halstead and
17 Restivo?

18 A. I don't know that. I may have
19 meant the prosecution into the murder of
20 Theresa Fusco.

21 Q. Which would include the prosecution
22 of John Restivo, Dennis Halstead and John
23 Kogut, correct?

24 A. Yes.

25 Q. The next thing you say here is, "I



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2 presented the evidence to the grand jury that
3 indicted both John Restivo and Dennis
4 Halstead. I tried the first John Kogut trial
5 in 1986, and I tried the Dennis Halstead and
6 John Restivo trial in 1986."

7 That's true, right?

8 A. Yes. I assume I knew the exact
9 dates then. It sounds right.

10 Q. Next paragraph, "I was involved in
11 post conviction DNA issues from the
12 beginning. I participated in the decisions
13 to grant all three Defendants new pursuant to
14 Section 440 of the Criminal Procedure Law.
15 Since then, I have supervised the trial or
16 retrial of John Kogut, and I had planned to
17 try John Restivo and Dennis Halstead."

18 Is that correct?

19 A. Yes, sir.

20 Q. And that is, in fact, what
21 happened, isn't it?

22 A. What is what happened?

23 Q. That you tried to cases against
24 John Restivo and Dennis Halstead, as well as
25 John Kogut in the first instance, correct?



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2 A. That's correct.

3 Q. And that there were a series of
4 post conviction DNA motions that were made in
5 these cases; is that correct?

6 A. Yes.

7 Q. And that you participated in all
8 the decisions on the testing and the
9 significance of the testing from the
10 beginning?

11 A. Yes.

12 Q. At some point in time, the
13 convictions of Restivo, Halstead and Kogut
14 were all vacated; is that correct?

15 A. Yes.

16 Q. Before that step was taken, did you
17 give careful reflection to all the evidence
18 in the case?

19 A. I hope so.

20 Q. I mean, that's not a decision you
21 made lightly, correct?

22 A. I didn't make the decision. So
23 let's get that straight right away.

24 Q. But you were one of the people that
25 was participating in the making the decision;



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2 is that correct?

3 A. I was participating in providing
4 input to the people who made the decision.

5 Q. The people who made the decision
6 were?

7 A. Well, it was certainly Dennis
8 Dillon, the District Attorney and whoever the
9 Chief Assistant was back then.

10 Q. Pat?

11 A. I'm not sure if it was Pat
12 McCormick or Harvey Levinson at that point.

13 Q. You recall at what point myself and
14 other lawyers representing Dennis Halstead
15 and John Kogut actually came to the grand
16 jury room right near here and made a
17 presentation of evidence?

18 A. I remember it, East Wing, basement.

19 Q. So the lawyers for Kogut, Restivo
20 and Halstead --

21 A. Was that before we had vacated the
22 convictions or after?

23 Q. Well before.

24 A. Before we vacated?

25 Q. You remember we made a presentation



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2 of evidence?

3 A. I remember that. I just don't
4 remember in sequence.

5 Q. After that presentation of
6 evidence, there was reinvestigation, I take
7 it, that you participated in before the
8 decision was reached to vacate the
9 convictions?

10 A. I didn't participate in the
11 reinvestigation. That was the homicide
12 squad.

13 Q. But you were aware of what they
14 uncovered?

15 A. I can't say I knew everything. I
16 was supervising it. I knew certain things,
17 certain things I didn't.

18 Q. After all the convictions were
19 vacated, a decision was made to retry John
20 Kogut, correct?

21 A. Yes.

22 Q. Then he was acquitted after a judge
23 trial in front of Judge Ort?

24 A. That's right.

25 Q. When you say here in the



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2 transcript, "I had planned to try John
3 Restivo and Dennis Halstead," by that did you
4 mean that if Restivo and Halstead were to be
5 retried, you personally would have tried the
6 case?

7 A. No. I doesn't mean I wouldn't have
8 tried the case, but that decision hadn't been
9 made yet.

10 The Trial Assistant on the John Kogut
11 case was no longer going to be an Assistant
12 DA in Nassau County. So something had to be
13 done, whether I was going to retry it or
14 somebody else.

15 Q. The trial was conducted by a,
16 let me pronounce his name, Mr. Biancavilla?

17 A. You did very well.

18 Q. You're indicating here that you
19 supervised the retrial?

20 A. Yes.

21 Q. The next thing you say here, and
22 I'm again referring to the transcript of
23 December 29th, 2005, "As such, Judge, I
24 suggest to the Court that I am at least in an
25 informed position to make this motion to the



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2 Court.

3 That was a fair statement at the time,
4 correct?

5 A. Yes.

6 Q. I realize it's been sometime since
7 you looked at this case, but you feel you're
8 pretty familiar with the facts?

9 A. Depends on what facts and how
10 familiar.

11 Q. At the time you made this
12 application, you were very familiar with the
13 facts, fair enough?

14 A. I don't know that I was in the best
15 position or the most informed, but I had
16 enough information to make the decision.

17 Q. It was your decision not to retry?

18 A. No.

19 Q. Whose decision was that?

20 A. Dennis Dillon.

21 Q. Turning to the next page, page
22 four, you said to the Judge, "Our plan, the
23 District Attorney's plan, was to see what
24 transpired with respect to the trial of John
25 Kogut, see how it turned out. That case, we



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2 felt, was much stronger on the evidence of
3 guilt than the evidence that we had against
4 Mr. Halstead and Mr. Restivo. And while that
5 case was proceeding, still investigating any
6 additional evidence against these two
7 Defendants that could be found and any new
8 evidence that could result would be generated
9 by the trial of John Kogut."

10 Have I read that correctly?

11 A. Yes. Actually, it's would result,
12 not could.

13 Q. "Would result or be generated by
14 the trial of John Kogut," right?

15 A. Yes.

16 Q. Would it be fair to say that the
17 evidence against Kogut was much stronger than
18 the evidence against Restivo and Halstead?

19 A. I felt so.

20 Q. And you felt so even when you first
21 tried these cases?

22 A. Yes.

23 Q. You go on to say, and now starting
24 at line 14, "At that point the sole evidence
25 that we had against Mr. Halstead and



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2 Mr. Restivo was (1) and this is before the
3 retrial, we had the hair of Theresa Fusco
4 found in John Restivo's van; we had some
5 ambiguous statements that both Defendants
6 made to third parties that could be inferred
7 to indicate that they had some knowledge
8 about the crime, and, finally, we had direct
9 statements that were alleged to have been
10 made to either inmates in the Nassau County
11 Jail or drug addicted acquaintances of the
12 Defendants, all of whom received benefits for
13 their testimony against these two
14 Defendants."

15 Have I read that accurately?

16 A. Yes.

17 Q. I realize that you were talking
18 here about both Restivo and Halstead at the
19 same time; is that correct?

20 A. Yes.

21 Q. As you sit here today, can you in
22 some ways differentiate between the two of
23 them with respect to ambiguous statements and
24 jailhouse informants, do you remember?

25 A. Generally. I mean, if you can



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2 bring some witness up, I can categorize it at
3 best.

4 Q. Best as you can remember, what
5 ambiguous statements were used against
6 Restivo and what jailhouse informants?

7 MR. SEPE: I'm sorry.

8 Just to clarify, Mr. Scheck, when
9 you say used against, you mean their
10 first trials?

11 MR. SCHECK: Yes, their first
12 trials.

13 THE WITNESS: The jailhouse
14 informant against Restivo was Stephen
15 Dorfman. I think that was his first
16 name. I'm trying to think if we used any
17 other jailhouse, I don't think so.

18 Halstead, we had a jailhouse
19 statement from a gentleman named --

20 MR. SCHECK:

21 Q. Lee O'Hanlon?

22 A. No, no. I'm talking about, well, I
23 guess you could consider that too, but he was
24 an acquaintance of Halstead. I'm talking
25 about a stranger.



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2 I forget the gentleman's name. He was on
3 probation, I believe.

4 (Discussion held off the record.)

5 No, no, I heard. Klink's statement, we
6 had a written statement that he gave or
7 somebody turned into the police. I'm
8 referring to somebody we actually used as
9 a witness. Henry, I remember.

10 Q. Mr. Klein, just hold on one second?

11 A. He was on probation for a marijuana
12 offense, I believe.

13 MR. FREEMAN: I could supply names,
14 but I don't think it's appropriate.

15 MR. SCHECK: I don't want you to
16 help out.

17 MR. FERGUSON: You could try Sam if
18 you want. You could try Carl.

19 THE WITNESS: Samuel Newsome.

20 MR. SCHECK:

21 Q. As far as the Restivo case is
22 concerned, do you remember when you said
23 ambiguous statements, do you remember what
24 you were referring to?

25 A. Yeah, there were a few. One set of



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2 statements, I can't say it was one statement.
3 It was made to Harry Smiley.

4 We had another, I think it was more of an
5 overhear, I would call it, than a statement
6 made to a Carl Pazzini, who I think was a
7 relative of Restivo, and I think he was
8 hearing Restivo making statements to somebody
9 else; and he didn't hear the whole statement.
10 He heard snip pets of it.

11 Then there was this whole issue with
12 respect to a witness who shares my last name,
13 Leo Klein with respect to --

14 Q. When tools were bought?

15 A. A sander, a rented sander and that
16 whole issue. So it turned out, I felt, my
17 recollection of it is that turned out to be
18 somewhat incriminating of Mr. Restivo when it
19 all came out.

20 Q. At the time that you tried this
21 case --

22 A. I mean, I just did the ones against
23 Restivo.

24 You don't want the ones by Halstead?

25 Q. No.



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2 A. Is Halstead represented by anybody
3 here?

4 Q. Yes, I represent him.

5 A. Oh, both.

6 Q. Tell us about Mr. Halstead.

7 A. Halstead we had that we used at the
8 trial. We had Samuel Newsome, which I
9 remember was a pretty direct admission.

10 We had a wiretap, bug, no, it was a
11 wiretap. It was on his phone.

12 He made an admission to his sister, I
13 believe, over the phone. She had asked him
14 if he did it, meaning, I think, the murder of
15 Theresa Fusco, and he said, "Yes."

16 And she said, "Did you really do it," or
17 "Are you really serious," or something.

18 And he said, "Don't ask me shit like
19 that."

20 Q. The defense was that he wasn't
21 being serious, if you recall?

22 A. I guess. I couldn't admit it. I
23 didn't admit that he was admitting it.

24 The people, the person you mentioned
25 before, the O'Hanlons, we had them, Harry and



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2 Brian. Newsome, Harry, Brian.

3 There may have been another one or two
4 statements against him. I'm drawing a blank
5 right now.

6 Q. A number of these witnesses were
7 drug addicts?

8 A. Yes.

9 Q. And even at the time of the trial,
10 the statement of, as you put it here, "drug
11 addicted acquaintances" was something of a
12 concern?

13 A. It's a credibility issue.

14 Q. And as far as the jailhouse
15 informants were concerned, even at that time,
16 was the testimony of jailhouse informants to
17 you, as a prosecutor, a matter of concern on
18 the issue of credibility?

19 A. Credibility was an issue.

20 Q. Let's go on to page five.

21 A. Sure.

22 Q. You tell the Judge, "The statements
23 that we had from the people who were
24 incarcerated with the Defendants or
25 acquainted with the Defendants and received



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2 benefits for their testimony were to the
3 effect that Mr. Halstead and Mr. Restivo had
4 sex with or raped the victim, but did not
5 kill her, that it was Mr. Kogut that had
6 killed her, statements that were consistent
7 with Mr. Kogut's statement to the police.
8 The DNA evidence, which was obtained post
9 conviction, significantly damaged our cases
10 against Mr. Halstead and Mr. Restivo. We
11 were left speculating as to why these two
12 admitted rapists left no DNA in the victim
13 while at the same time there was the DNA of
14 somebody else in the victim, and to this date
15 the DNA has not been identified, despite a
16 new police investigation which specifically
17 compared 59 people who were acquainted with
18 the victim or the Defendants or the case in
19 some way, as well as analysis of various DNA
20 databanks that have come up with no match to
21 the DNA that was present in the victim."

22 So would it be fair to say that after the
23 DNA results came out, you had even more
24 concerns about the reliability, first, let's
25 say, of the jailhouse informants?



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2 A. After the ultimate DNA results came
3 out. There were like two or three series.

4 Q. Yes.

5 A. So after the final rounds of
6 testing, yes, that's correct.

7 Q. Why did you have these doubts after
8 the final round of DNA testing about the
9 jailhouse snitches?

10 A. Well, my understanding of the DNA
11 testing at that point was that there was,
12 there was DNA in the victim which had not
13 come back to a match, however you want to
14 phrase it, to any of the Defendants, but yet
15 it was someone else's, and that someone else
16 was not Theresa Fusco and was a male. I
17 believe that's about as much as we knew.

18 Q. What you said is on the record.

19 But was part of what concerned you now
20 about the admission, so-called admissions to
21 the jailhouse informants, is it those
22 admissions by Restivo and Halstead was that
23 they had sex with the victim and none of
24 their DNA is there, so that raised even more
25 concern in your mind that they were not



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2 truthful witnesses?

3 A. It raised a concern in my mind as
4 to, yeah, I would agree with your statement.

5 Q. And the same would be true for
6 ambiguous statements or admissions to the
7 drug addicted acquaintances?

8 A. Yes.

9 MR. SEPE: Objection.

10 MR. SCHECK:

11 Q. Picking up where I left off, you
12 then told the Court, "So we were left with
13 speculating as to why their DNA wasn't there
14 and whose DNA is there, and although I would
15 state that the science of how long seminal
16 fluid had been in the victim is somewhat
17 ambiguous, we had no direct proof, none that
18 it was the result of a consensual sexual
19 relationship between the victim and somebody
20 else, which led to the conclusion that, or
21 the reasonable conclusion that it had been
22 the result of the rape."

23 Have I read that correctly?

24 A. Basically.

25 Q. So it's fair to say that through



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2 all the investigation in this case, you had
3 no proof, none, that somebody had had a prior
4 consensual relationship with Theresa Fusco
5 before she had disappeared from Hot Skates?

6 A. I would disagree with you on just
7 one minor point in the statement. We had
8 indirect proof.

9 I said we had no direct proof. We had no
10 admissions. We had no eyewitnesses. We had
11 nothing like that.

12 We did have, I felt, some proof in the
13 testimony of an expert that Mr. Biancavilla
14 had found, with respect to, and I never did
15 fully understand it, something to do with the
16 timing of the DNA in Ms. Fusco, which, I
17 think we argued lend itself to a voluntary
18 sexual partner as opposed to happening at the
19 time of the crime, but that's about as much
20 as I understand about it. So I specifically
21 said direct proof there.

22 Q. I think you also said that "the
23 science of how long the seminal fluid had
24 been in the victim is somewhat ambiguous"?

25 A. That's what I said. Whether I



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2 could have used a better word than
3 "ambiguous," it certainly wasn't conclusive.

4 Q. Then you go on to say, "In light of
5 the acquittal of John Kogut last week, it
6 became apparent to us that our efforts to
7 explain the DNA as being somehow not
8 inconsistent with the Defendants' guilt was
9 not enough to persuade a fact finder, and
10 that's in a case where there was a videotaped
11 confession; and Mr. Kogut did not even
12 confess to having sex himself with the
13 victim. So we felt that we had a stronger
14 argument there as to why the DNA was not
15 present than we would have at a trial of
16 Mr. Halstead and Mr. Restivo who allegedly
17 admitted that they did have sex with the
18 victim. And, obviously, Judge, if we were
19 not able to persuade one fact finder in that
20 particular case where we felt the evidence
21 was so much stronger, it became clear to us
22 that it would be much more difficult to
23 persuade 12 fact finders unanimously beyond a
24 reasonable doubt."

25 Have I read that accurately?



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A. Basically. I mean you change "would" to "could" sometimes, but, yeah, I agree with what you're saying.

Q. You go on to say, "Moreover, Judge, the DNA evidence directly contradicts the admissions that these two Defendants were supposed to have made to jail inmates and other people getting deals, admissions that obviously in the law are inherently suspect because of the source and benefits that were accorded to these people as a result of their testimony."

Have I read that accurately?

A. Yes.

Q. When you're saying here, what do you mean by that "jail inmates and other people getting deals, and admissions that obviously in the law are inherently suspect because of the source and the benefits that were accorded to these people"?

A. Well, as you know, when the prosecution offers people something in return for the testimony, that inherently becomes an issue of their credibility, whether they're



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2 testifying based upon what they truthfully
3 know or whether they're testifying based upon
4 wanting to get something in return.

5 Q. So would it be fair to say that
6 what you're telling the Judge here is that
7 the testimony of jailhouse informants, people
8 getting deals is inherently suspect, and now,
9 in light of the DNA results, those seem to
10 directly contradict what these informants
11 claimed Restivo and Halstead said, correct?

12 A. That's what I said.

13 Q. And then I'm reading now, "Finally,
14 Judge, in Judge Ort's decision last week in
15 the Kogut trial, he affirmatively found as
16 part of his decision that the only other
17 forensic evidence we had in this case that
18 connected the Defendants to the crime was the
19 hair of Theresa Fusco found by the police in
20 John Restivo's van. The Judge made a
21 specific finding that, in fact, that hair did
22 not come from John Restivo's van, a finding
23 that we felt was likely going to preclude us
24 from introducing that same hair evidence in
25 the trial of these two Defendants.



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2 Accordingly, your Honor, without the hair
3 evidence connecting the Defendants to the
4 crime, with unexplained DNA evidence
5 basically disproving our theory of the case
6 from the only direct evidence we had, which
7 was these jailhouse admissions, we could not
8 persuade a rational juror of either
9 Mr. Halstead's or Mr. Restivo's guilt beyond
10 a reasonable doubt."

11 Have I read that accurately?

12 A. "Rational jury," but, yes, you did.

13 Q. Did you believe all that when you
14 said it?

15 A. Absolutely.

16 Q. You stand by that today?

17 A. Absolutely.

18 Q. Let's talk a little bit about the
19 hair. You say here that there was a hair
20 that was found in John Restivo's van that was
21 from Theresa Fusco.

22 A. That was my understanding.

23 Q. And that was the only forensic
24 evidence that you had that tied, certainly,
25 John Restivo, certainly, to the case; fair



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2 enough?

3 A. Yeah, that's my recollection.

4 Q. Let me ask you, before you came
5 here and testified today, what documents, if
6 any, did you review in preparation for your
7 testimony?

8 A. I reviewed this.

9 Q. This meaning?

10 A. I'm sorry, the exhibit that you've
11 been questioning me about.

12 Q. Exhibit 71, which is your
13 statements at the time the case was
14 dismissed, correct?

15 A. Yes. I reviewed, I know I reviewed
16 a letter that I had written to Mr. Kogut's
17 lawyer, Jimmy Woods.

18 Q. What letter was that?

19 A. It was a discovery response, a
20 response to his discovery request.

21 Q. Jimmy Woods, when was he
22 representing Kogut?

23 A. He represented Kogut, I know, at
24 least for the hearing.

25 Did he do the trial?



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2 I'm trying to think. He represented him
3 at the trial.

4 Q. What was in the letter?

5 A. The typical demand to produce that
6 he made and our response to it. I believe I
7 reviewed some, some random Court paperwork,
8 whether it was motions or oppositions to
9 motions relating to, either relating to
10 requests for a new trial or further DNA
11 testing, something of that sort.

12 I can't, I don't remember exactly what
13 they were. That's all I can remember. There
14 were several of those, there were maybe four
15 or five of those.

16 Q. Where did you review these?

17 A. My house.

18 Q. How did you get those?

19 A. My lawyer.

20 Q. You're indicating Mr. Sepe, who's
21 sitting next to you?

22 A. Yes.

23 Q. Do you have an understanding as to
24 who asked you to look at those?

25 A. No.



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2 Q. Do you have those documents that
3 you reviewed here today?

4 A. No.

5 Q. Have you looked at any of the
6 depositions of Detective Volpe in this case?

7 A. The civil case?

8 Q. Yes.

9 A. No.

10 Q. And going back to this statement
11 you made to the Court, I think that you put
12 the evidence against Restivo and Halstead
13 into three categories; number one, the hair
14 found in the van, correct?

15 A. Yes.

16 Q. Number two, ambiguous statements to
17 third parties; is that correct?

18 A. Yes.

19 Q. And number three, direct statements
20 made to inmates or drug addicted
21 acquaintances, correct?

22 A. Yes.

23 Q. That was basically the case against
24 both of them?

25 A. Yes.



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2 Q. It was the theory of the
3 prosecution case that it was Mr. Restivo's
4 van that was used to abduct Theresa Fusco and
5 that some of the Defendants at least had sex
6 with her in that van?

7 A. I would agree with that she was
8 abducted in. As to where they had sex with
9 her, I don't recall.

10 Q. But it was the prosecution's theory
11 in this case that she was abducted in the van
12 and then delivered to at some point in time
13 the spot where her body was discovered,
14 correct?

15 A. Yes.

16 Q. And somewhere along the line, she
17 was raped and murdered?

18 A. Yes.

19 Q. So it would be fair to say that a
20 critical part of this case is that it was
21 John Restivo's van that was used in the
22 abduction of Theresa Fusco?

23 A. It was a part of the case.

24 Q. If there were evidence that another
25 car was involved in the abduction of Theresa



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2 Fusco, that would be evidence that directly
3 contradicted a main part of your case,
4 correct?

5 MR. SEPE: Objection as to the form
6 of the question.

7 You can answer.

8 THE WITNESS: It would directly
9 contradict Mr. Kogut's confession.

10 MR. SCHECK:

11 Q. That theory was the basis upon
12 which you were trying Kogut, Restivo and
13 Halstead?

14 A. Not the confession so much as the
15 evidence we had against Halstead, Kogut and
16 Restivo.

17 Q. But what I'm talking about is the
18 theory that Mr. Restivo's van was used for
19 the abduction.

20 That was a mainstay of the theory in both
21 cases?

22 A. Yes.

23 Q. If there were evidence that had
24 been brought to your attention that another
25 car was one that was used to abduct Theresa



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1 Klein
2 Fusco, that would be a direct contradiction
3 to one of the mainstays of your theory of the
4 case?

5 MR. SEPE: Objection as to form.

6 THE WITNESS: I don't want to use
7 the word "direct contradiction." It
8 would be inconsistent.

9 MR. SCHECK:

10 Q. Directly inconsistent?

11 A. Depends upon the nature of the
12 evidence.

13 Q. As far as the hair is concerned, if
14 it had, if you had come to learn at the time
15 of the trial of Restivo, Kogut and Halstead
16 that Detective Volpe had planted Theresa
17 Fusco's hair, either in the envelope that
18 contained the hair that was vacuumed from the
19 van or directly in the van, would that have
20 been a matter of concern?

21 A. Of course.

22 Q. If you came to believe that he had,
23 that is, Volpe had planted the hair, would
24 you have considered criminally prosecuting
25 him?



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2 MR. SEPE: Objection as to form.

3 Mr. Scheck, rather than me
4 continuing to object, I'll just note a
5 blanket objection.

6 MR. SCHECK: Sure.

7 MR. SEPE: I completely understand
8 that you need to ask the witness to
9 hypothesize on certain facts; however,
10 for purposes of form, it does amount to
11 asking him to speculate.

12 So we'll have a continuing
13 objection as to any questions that
14 request him to speculate, and that way I
15 won't be interrupting.

16 MR. SCHECK: Fine.

17 MR. SCHECK:

18 Q. Let me be clear as to how I'm
19 asking you this question, Mr. Klein. I'm
20 asking about your understanding at the time
21 of the trials.

22 A. You're talking about in 1986 or
23 '85?

24 Q. Yes. If you had found out in 1986
25 or '85, proof that you considered persuasive



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2 that Volpe had planted Theresa Fusco's hair
3 in this case, would you have considered
4 prosecuting him for that criminally?

5 A. I'll answer that a little
6 differently. I certainly would have called
7 it to the attention of people that would make
8 that judgment. That wouldn't have been my
9 decision.

10 Q. Right, you were in a position to
11 make recommendations about what should be
12 done?

13 A. I was a trial attorney in the Major
14 Offense Bureau, which had nothing to do with
15 the type of criminal activity you're talking
16 about, but, certainly, I would have taken
17 that information and given it to people who
18 would deal with it.

19 Q. Let me approach it this way.
20 Would you not agree that if there were
21 persuasive evidence discovered at the time of
22 the Restivo, Kogut and Halstead trial that
23 Volpe had planted the hair, planting the hair
24 could well be considered criminal conduct,
25 right?



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A. Sure.

Q. What kind of crime would that be?

A. Some type of obstruction of justice. You know, without the penal law in front of me, I can't think of specific crimes, but it would certainly be criminal.

Q. And if you had discovered at the time of the Restivo, Kogut and Halstead trials substantial evidence that Volpe had planted the hair, would that not raise serious concerns about his credibility as a witness?

A. Is that your question?

Q. That's my question?

A. Yes.

Q. Would that not also present significant problems for you in terms of going forward with the case, certainly, against Restivo and Halstead?

A. Well, in a sense that if what you say is true, that evidence would not be admissible, the hair, then it would be a problem.

Q. But beyond being not admissible, he



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2 was the lead investigator in this case,
3 Volpe, right?

4 A. Yes.

5 Q. So if evidence emerged, persuasive
6 evidence, that Volpe, the lead investigator
7 in this homicide investigation had planted
8 the hair, would that not have created an
9 extremely serious problem for you in the
10 Restivo and Halstead case in terms of even
11 moving forward with the criminal prosecution?

12 A. I can't say that.

13 Q. Would it not be damaging to the
14 credibility of the entire investigation if it
15 turned out there was substantial evidence
16 that the lead investigator had planted the
17 hair of the victim in the van of the
18 Defendant?

19 A. The reason for my response is I
20 don't believe Volpe testified to anything in
21 Halstead and Restivo, or at least anything
22 admissible. So if he had committed those
23 acts, you know, I don't know how it would
24 have affected the rest of the case.

25 We certainly wouldn't use the hair



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2 evidence, and if he didn't testify, I don't
3 think they made any admissions to him, I
4 don't know how it would have affected the
5 case.

6 Q. Was Volpe not involved in producing
7 some of these jailhouse witnesses?

8 A. Producing them, no.

9 Q. In their interrogations?

10 A. I don't know if he was. I know
11 there was a detective, big tall fellow,
12 Michael Connaughton. I know the Samuel
13 Newsome case and the witness and the Dorfman
14 witness came to me through Connaughton. I
15 don't know about Volpe's involvement.

16 Q. As the lead homicide detective in
17 the case, the other detectives are under his
18 supervision, correct?

19 A. Yes.

20 Q. If the lead homicide detective in
21 the case, there's substantial evidence that
22 he planted a hair, that's something that you
23 would have been concerned about, in 1986,
24 casting doubt on all aspects of the
25 investigation; fair enough?



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2 A. No. I disagree with that.

3 I would have been concerned about it, but
4 it didn't necessarily cast any doubts on the
5 rest of the case. Like I just said before,
6 he didn't testify.

7 Do I, you know, that's basically it. I'm
8 trying to answer your question as best as I
9 can. If what you said happened happened, it
10 would be a very troublesome issue, but I
11 don't think, technically, that it would
12 affect the proof of the case in Halstead and
13 Restivo.

14 And I'll be quite frank with you. I
15 don't know that you would even get it into
16 evidence.

17 That's my point. I don't know that you,
18 or whoever represented them back then, would
19 get that into evidence, based upon the other
20 type of evidence we had, and if you didn't
21 get it into evidence, I don't know that it
22 would affect the rest of the case.

23 And you and I can dispute the evidentiary
24 issue. That's my opinion about it.

25 Q. Would it be fair to say that if



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2 persuasive or substantial proof had been
3 discovered that Volpe planted the hair, that
4 could affect the judgments about witnesses
5 that Volpe did interview?

6 A. Yes.

7 Q. I think you said that if there were
8 substantial evidence that Volpe planted the
9 hair, then that would mean you wouldn't have
10 the hair in the case against Restivo and
11 Halstead?

12 A. I certainly wouldn't be using the
13 hair.

14 Q. Then you would have been left with
15 a case based upon drug addicted acquaintances
16 and jailhouse informants, correct?

17 A. And some, you know, I don't know
18 that all the acquaintances were drug
19 addicted, Mr. Scheck. I don't know that all
20 the acquaintances were drug addicted, like
21 Harry Smiley.

22 I wouldn't necessarily lump him in with
23 that. There were statements that we used
24 that he received from Restivo that, to me,
25 indicated that they were incriminating.



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2 They weren't direct admissions of guilt.

3 So I characterize those as ambiguous, and if

4 Smiley was drug addicted, I don't remember.

5 Q. Do you remember any mental problems
6 Mr. Smiley may have been having?

7 A. No.

8 Q. Do you recall that Volpe
9 interviewed Smiley?

10 A. At what point?

11 Q. Do you recall that it was Volpe
12 that took the pretrial statements of Smiley?

13 A. I don't.

14 Q. But I think you're telling us that
15 any witness whose statements were first
16 developed by Volpe, that if it turned out
17 there was substantial evidence that Volpe
18 planted the hair, that would cast doubt on
19 the credibility of those witness statements?

20 A. If I found out that it was to Volpe
21 that the first incriminating statements of
22 the witness came, it would be an issue that I
23 would consider in credibility, under that
24 foundation that we knew that Volpe planted
25 hair.



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2 Q. As opposed to what would be a
3 legally sufficient case, technically
4 speaking, you could have moved forward, in
5 1986, with a case just based on direct
6 admissions to the jailhouse snitches in terms
7 of Restivo and Halstead, correct?

8 A. Let me think about that for a
9 minute. My recollection is we could have,
10 but I would really have to look at the
11 evidence in a lot greater detail to see if we
12 had a legally sufficient case. My gut
13 reaction is we would have.

14 Q. We're talking here without the
15 hair?

16 A. Yes.

17 Q. But it's one thing to have what
18 might be technically a legally sufficient
19 case, and it's quite another to actually
20 proceed with the prosecution, isn't it?

21 MR. SEPE: Objection as to form.

22 You can answer that.

23 THE WITNESS: In some cases.

24 MR. SCHECK:

25 Q. So it's not always the case that if



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2 you have a technically sufficient case that
3 one would necessarily proceed with the
4 prosecution if you had doubts about
5 credibility of witnesses?

6 A. Let's just clarify what you mean by
7 a legally sufficient case.

8 What standard are you talking about?

9 Q. What standard would you use?

10 A. I'm talking about a prima facie
11 case, that we would have enough in, let's
12 say, grand jury that a judge would not
13 dismiss an indictment for insufficient
14 evidence as opposed to whether we could
15 convict the person or not.

16 Q. But even in a case that is "legally
17 sufficient," a lot depends upon the
18 assessment of the credibility of witnesses,
19 correct?

20 A. Well, again, under my definition of
21 legally sufficient?

22 Q. I'm not quarrelling with your
23 definition of legally sufficient.

24 A. There are different stages, you
25 know, as to what would be sufficient.



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2 Q. Go ahead.

3 A. At the end of the trial, my
4 recollection is we would have to establish
5 proof beyond a reasonable doubt, but on a
6 grand jury level, we would have to establish
7 prima fascia case.

8 Q. But even in assessing whether
9 there's a prima fascia case, if a prosecutor
10 comes to the judgment that witnesses are not
11 credible, then one does not proceed with the
12 case, correct?

13 MR. SEPE: Objection as to form as,
14 again, not to the prior objection, but
15 now we're not speculating as to his
16 particular experience but as to a
17 prosecutor or an attorney general.

18 MR. SCHECK:

19 Q. Your understanding of how
20 prosecutors operated in 1986.

21 A. If I had a case where I didn't
22 believe the only witnesses against the
23 Defendant, I'm not going to have a legally
24 sufficient case. I wouldn't have a
25 sufficient case because then, to me, I



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2 wouldn't have sufficient credible evidence
3 that the Defendants committed the crime.

4 Q. If you didn't have the hair --

5 A. Right.

6 Q. -- and you came to believe that the
7 drug addicted acquaintances and jailhouse
8 informants were not credible --

9 A. Were all lying?

10 Q. Were not credible. I'm asking you,
11 it's a hypothetical.

12 A. Okay.

13 Q. In your understanding of how
14 prosecutors operated in 1986 --

15 A. I can say how I operated. I can't
16 testify for prosecutors. You know that.

17 Q. You had some kind of an
18 understanding in 1986 as to what --

19 A. My understanding.

20 Q. As to how your office worked,
21 correct?

22 A. Correct.

23 Q. And what were the customs and
24 practices of the office?

25 A. Right.



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2 Q. In 1986, if you did not have the
3 hair in the Restivo/Halstead case, and there
4 was substantial evidence that the lead
5 detective had planted the hair and you came
6 to have serious doubts about the credibility
7 of the drug addicted acquaintances and
8 jailhouse snitches, then you wouldn't have
9 proceeded with the case?

10 A. I can't say that the way you
11 phrased the question.

12 Q. What about my phrasing of the
13 question is troubling to you?

14 MR. FERGUSON: Just note my
15 objection to this line of questioning.

16 THE WITNESS: You're talking about
17 a case without any facts or any
18 foundation. You're talking about some
19 serious or substantial doubts about the
20 credibility of one or more witnesses, and
21 you're saying I wouldn't have proceeded
22 with the case.

23 There's a lot of variables in
24 there, and I can't just make a flat out
25 generalized statement about that. If I



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1 Klein
2 concluded that all the evidence against
3 the Defendants was false, I can assure
4 you I wouldn't have proceeded with the
5 case.

6 If one witness was very good, and
7 the rest of them stunk, then I would have
8 to make a different evaluation.

9 MR. SCHECK:

10 Q. You indicated at the dismissal
11 hearing that there was a finding by Judge Ort
12 that the hair did not come from John
13 Restivo's van, correct?

14 A. Yes.

15 MR. SCHECK: Why don't we show
16 Mr. Klein Exhibit 11.

17 MR. SCHECK:

18 Q. While we're getting that out, when
19 did you first get involved in the Restivo,
20 Halstead and Kogut prosecutions, in terms of
21 the stages of the investigation?

22 A. I first got involved with Halstead
23 and Restivo. They had not been charged with
24 any crime at the time, and Mr. Kogut had
25 already been arrested.



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1 Klein

2 MR. SCHECK:

3 Q. So that would have been after
4 Mr. Kogut's confession on March 26th?

5 A. I was not involved in that. I was
6 assigned after that.

7 Q. Take a look at Exhibit 111.
8 You see that is an eavesdropping warrant,
9 right?

10 A. No, not the one I have.

11 Q. What do you have?

12 A. It looks like a search warrant.
13 Oh, I see it's on another, the front page I
14 have is the search warrant, Mr. Scheck.

15 (Discussion held off the record.)

16 MR. SCHECK:

17 Q. Mr. Klein, we're showing you
18 Exhibit 157, and this is a warrant for an
19 extension of wiretapping.

20 Do you see that?

21 A. I see it's an eavesdropping
22 warrant.

23 Q. If you look at page four, you'll
24 see the date of issuance being March 29th,
25 1985, at 4:04 p.m.?



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2 A. Okay.

3 Q. Do you see that?

4 A. Yes.

5 Q. Did you have any involvement in
6 putting together this application for an
7 extension of the wiretap?

8 A. No.

9 Q. Do you recall who was handling
10 those?

11 A. I can give you a guess, an educated
12 guess, but I wasn't involved in the case. So
13 I just know who was.

14 Q. Who was?

15 A. Ed McCarty. Whether he did this or
16 not, I don't know.

17 Q. Has this particular wiretap
18 extension application and Detective Volpe's
19 affidavit in support of it been called to
20 your attention at all recently?

21 A. No.

22 Q. Or at any time?

23 A. Any time, I'm sure when I was
24 trying the case, it had been, but I don't
25 remember it at all.



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2 Q. You see that Detective Volpe issues
3 an affidavit in support of this wiretap
4 application?

5 A. Yes.

6 Q. And this was also sworn by Volpe on
7 March 29th, correct?

8 A. Yes.

9 Q. Do you know Sean Spillane?

10 A. I know him.

11 Q. Who was he?

12 A. At some point he was the head, I
13 guess they called him the Commanding Officer
14 of the Homicide Squad in the Nassau County
15 Police Department.

16 Q. I represent to you that he was
17 deposed in this matter.

18 A. I have no idea.

19 Q. I'm telling you, on April 21st,
20 2010, and I would like to read for you from
21 page 259 at line 21, a question and answer.

22 MR. SEPE: I'm sorry, what are you
23 reading from?

24 THE WITNESS: Can I have a copy of
25 it, to follow, like all the other



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2 exhibits?

3 MR. SCHECK:

4 Q. Why don't we read together.

5 "Question: Absent the wiretaps, there
6 was a very weak, if nonexistent, case against
7 John Restivo and Dennis Halstead, right?

8 "Answer: At that time."

9 Do you see that?

10 A. Yes.

11 At what time?

12 Q. At a time before the wiretaps.

13 MR. FERGUSON: Note my objection.

14 MR. SCHECK:

15 A. I wasn't involved at that time, but
16 I see it.

17 Q. You recall the presentation of hair
18 evidence in this case, do you not?

19 A. Where, when, who?

20 Q. At the trial.

21 A. Of?

22 Q. Of Restivo, Kogut and Halstead.

23 A. Yes.

24 Q. You knew Mr. Fraas, he was the hair
25 examiner?



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2 A. Charles Fraas.

3 Q. How well did you know him?

4 A. Well, I certainly had worked with
5 him before. He was a witness in other cases.
6 That was the extent of it.

7 Q. Did you have any familiarity at the
8 time of the trial with hair examination?

9 A. At the time of the trial I did,
10 yeah. I didn't before that.

11 Q. So this was your first one with
12 hair?

13 A. The first one I recall, I mean, the
14 first one that was challenged, certainly.

15 Q. Since then, have you learned
16 something about the process of microscopic
17 hair examination?

18 A. I've been exposed to other people
19 talking about it. How much I've learned
20 about it, I don't know.

21 Q. This was an issue in the retrial of
22 John Kogut?

23 A. Yeah, it was.

24 Q. The hair evidence was gone over
25 with some care in the reinvestigation of this



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2 case that led to the decision to vacate the
3 conviction?

4 A. The hair evidence was gone over,
5 yeah.

6 Q. Did you know Fraas to be, in 1986,
7 did you believe him to be an honest and
8 trustworthy guy?

9 A. Yeah.

10 Q. Anything since then that's changed
11 your belief?

12 A. No.

13 Q. I'm going to hand you a copy of
14 Mr. Fraas' deposition in this matter.

15 A. Do you want me to read this?

16 Q. No, no, I'm going to take you
17 through it. Let's start at page 22 --

18 A. Got it.

19 Q. -- of the Fraas deposition.

20 In your review of this case, you recall
21 that --

22 A. Are you reading something?

23 Q. No, I'm asking a question.

24 In the afternoon of March 26th, after
25 Mr. Kogut was arrested, the evening of



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2 March 26th, the van was seized from

3 Mr. Restivo?

4 MR. FERGUSON: Note my objection.

5 THE WITNESS: Yeah, I couldn't say
6 when in the sequence the van was seized.

7 I wasn't involved in that either.

8 MR. SCHECK:

9 Q. Here's 111, the one we were looking
10 at before. This is an order for the seizure
11 of the van.

12 A. That's what you showed me before?

13 Q. Yes, and you see at the bottom it
14 says, "You are, therefore, commanded between
15 March 26th, 1984 and April 4th, 1985, between
16 the hours of 6:00 a.m. and 9:00 p.m., to
17 seize a 1977 Ford, New York registration 3525
18 BCG, and if you find such property or
19 evidence or any part to bring it before me."

20 Do you see that?

21 A. Yes, I do.

22 Q. I show you Exhibit 112.

23 What do you recognize that to be?

24 A. This is, I think they call it a
25 worksheet from the Crime Scene Search Unit



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1 Klein
2 with a listing of photographs that were
3 taken.

4 Q. And you see that this refers to the
5 1977 Ford Econoline van, do you see that?

6 A. Yes.

7 Q. And you see where it says, "Time
8 Received"?

9 A. Where are you reading from?

10 Q. At the top. "Van, Time Received"?

11 A. Yes.

12 Q. And that's 1800 hours, or
13 6 o'clock, on March 26th, 1985?

14 A. 1300 or 1800?

15 My copy's kind of blurry, and my
16 eyesight's not great at that distance.

17 Q. Does this refresh your recollection
18 that the van was in the custody of the police
19 on the evening of March 26th?

20 MR. FERGUSON: Note my objection
21 about refreshing his recollection.

22 THE WITNESS: No.

23 MR. SCHECK:

24 Q. Would you agree that the van was in
25 the possession of the police on March 26th?



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2 A. I have no idea.

3 Q. Really?

4 A. I do not.

5 Q. Let's start reading from the Fraas
6 deposition, page 22, line 13.

7 A. Okay.

8 Q. Maybe the better place is to start
9 with you on page 21, line 24.

10 "Question: And a number of hairs from
11 various sections of the van were collected?

12 "Answer: Yes.

13 "Question: And you and Mr. Birdsall
14 spent the rest of that night examining those
15 eleven blankets, the pillowcase, black
16 T-shirt for hair and trace evidence in the
17 lab, right? Up to midnight on the day of
18 March 26th, 1985, that's what you did?

19 "Answer: Yes, ma'am.

20 "Question: You did not begin any
21 examination of any hair evidence that day?

22 "Answer: I don't believe I did."

23 Do you see that?

24 A. Yes.

25 Q. So do you have it in mind that



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2 Fraas is testifying here that they collected
3 hairs from the van, but he did not begin any
4 examination of hair evidence that day,
5 March 26th?

6 MR. SEPE: Objection to form.

7 THE WITNESS: You know, it really
8 doesn't exactly say that either. It says
9 they examined evidence, and he did not
10 examine hair evidence that day.

11 MR. SCHECK:

12 Q. Yes, that's my --

13 A. When they got the hairs, I don't
14 know. Again, you're assuming that they got
15 it at the time they examined those blankets
16 and the pillow case, et cetera. To me it's
17 not clear, that's all I'm saying, as to when
18 they got the hair evidence.

19 Q. But you don't dispute, do you, that
20 Fraas is testifying here that he didn't begin
21 the examination of any hair evidence on the
22 26th?

23 A. That's correct.

24 Q. This probably goes out saying, but
25 if you had discovered evidence that Volpe



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2 planted the hair, that's something you would
3 have disclosed to the Defense?

4 A. Yeah, sure.

5 Q. Turn to page 26.

6 Why don't we start at 26, line 22?

7 A. Okay.

8 Q. "Question: Sir, please turn with
9 me to page 1278 of Exhibit 3, your testimony
10 at the Restivo and Halstead trial. At line
11 five.

12 'Question: Now, how many hairs would you
13 approximate were acquired from this van on
14 March 26th, 1985?

15 'Answer: 100 or more.

16 'Question: Do you see that?

17 'Answer: Yes.

18 'Question: Does that refresh your
19 recollection that you collected 100 or more
20 hairs from the van that day?

21 'Answer: I believe I just answered that
22 question when you asked me whether 200 or
23 more hairs. I wasn't comfortable with 200.
24 I said my recollection was a hundred or
25 more.' "



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1 Klein

2 Do you see that?

3 A. Yeah.

4 Q. So based on Fraas' testimony here,
5 and your recollection, do you accept it that
6 100 or more hairs were collected from the
7 van?

8 MR. SEPE: I'm sorry, just
9 objection as to form.

10 The witness is asked to opine about
11 an out-of-Court deposition at which he
12 was not present which is actually
13 referring to double hearsay and the
14 matter of someone else's recollection
15 being refreshed.

16 But that notwithstanding, if you
17 understand the question, answer it.

18 THE WITNESS: Yes, that's what
19 Mr. Fraas testified to.

20 MR. SCHECK:

21 Q. If it was his testimony at the
22 trial that 100 or more hairs were collected,
23 I take it you would accept that as accurate?

24 A. Yes.

25 Q. And you did at the time?



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1 Klein

2 A. I did.

3 Q. Let's start at page 30.

4 MR. FERGUSON: We're looking at the
5 EBT now?

6 MR. SCHECK: Yes.

7 MR. SCHECK:

8 Q. "Question: And that was the first
9 stage of your examination of hairs from the
10 van --

11 A. Where are we now?

12 Q. Line seven.

13 A. Okay.

14 Q. "Question: And that was the first
15 stage in your examination of hairs from the
16 van, the gross visual examination, right?

17 "Answer: Yes, ma'am.

18 "Question: And that's an examination
19 with an eyeball, not a microscope?

20 "Answer: Yes, ma'am.

21 "Question: And that was consistent with
22 your standard practice?

23 "Answer: And the purpose of that gross
24 visual examination of hairs collected from
25 the van was simply to determine which hairs



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1 Klein
2 to mount on a slide, right, for possible
3 comparison purposes to a known sample?

4 "Answer: Yes.

5 "Question: The gross visual examination
6 is not a full-fledged examination for a hair
7 microscopist, is it; it's just the first,
8 it's the first step?

9 "Answer: Yes."

10 Do you see that?

11 A. Yes.

12 Q. Is that consistent with your
13 understanding of how hair examination works?

14 A. At least as far as Detective Fraas
15 is concerned.

16 Q. Is that your understanding of how
17 he proceeded in this case?

18 A. Yes.

19 Q. Let me now draw your attention to
20 page 31, line seven.

21 "Question: And, again, this was just a
22 preliminary step in your ultimate examination
23 and comparison of hairs?

24 "Answer: Yes.

25 "Question: And once you complete the



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2 preliminary examination of each and every one
3 of those hairs collected from the van, you
4 don't have any results to report yet, right?

5 "Answer: If a hair was grossly
6 dissimilar, I guess the results would be that
7 it could be eliminated as possibly coming
8 from the scalp of the known sample."

9 "Question --

10 A. "Perhaps."

11 Q. Do you see that?

12 A. "Perhaps," he said.

13 Q. Oh, "perhaps."

14 "Question: Leaving aside the similar
15 hairs that you elected not to mount because
16 they were obviously not the victim's, after
17 you collected the gross visual examination of
18 all of the hundred or more questioned hairs
19 collected from the van in that preliminary
20 step, you could not report the result of a
21 microscopic comparison between those hairs
22 and the known hairs because you hadn't done
23 one yet, fair to say?

24 "Answer: Yes."

25 Do you see that?



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1 Klein

2 Q. And you agree that's how the
3 microscopic hair examination went
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2 this case, that no result could be reported
3 of a consistency between known hairs and the
4 unknown hairs until the slides are mounted
5 and there's a microscopic examination?

6 MR. FERGUSON: Note my objection.

7 THE WITNESS: In his opinion,
8 that's true.

9 MR. SCHECK:

10 Q. That's how he proceeded, right?

11 A. Yes.

12 Q. That was your understanding at the
13 time of the trial of how he proceeded?

14 A. That was my understanding, what he
15 testified to.

16 Q. Now I turn your attention to page
17 39.

18 "Question --

19 MR. FERGUSON: Can you give me a
20 line?

21 MR. SCHECK: Line four.

22 MR. SCHECK:

23 Q. "Question: Fair to say that you
24 created 80 slides from the questioned hairs
25 collected from the van?



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2 "Answer: Yeah. It appears that there
3 were four slide holders. Each slide holder
4 has 20 slots for slides.

5 "Question: And they were filled up, each
6 of them was filled up?

7 "Answer: That's what I testified to.

8 "Question: You mean 80 slides from the
9 question hairs?

10 "Answer: As I sit here today, I don't
11 know if each were filled up, but that's what
12 I testified to.

13 "Question: Would you agree, sir, that it
14 took days and days to complete the mounting
15 of those 80 slides?

16 "Answer: Yes.

17 "Question: After your careful process of
18 doing gross visual examination of hairs
19 before mounting them, right?

20 "Answer: Yes.

21 "Question: Which itself took days?

22 "Answer: I don't know how long that
23 process took.

24 "Question: Doing a careful, thorough
25 gross visual examination over 100 questioned



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2 hairs, you certainly couldn't have finished
3 that in a single day, could you?

4 "Answer: That's correct."

5 Do you see that?

6 A. Yes, I do.

7 Q. Let's turn to page 70, line 16.

8 "Question: Once you got to the
9 microscopic phase of an examination in this
10 case, you built up a profile of microscopic
11 characteristics for these hairs, right?

12 "Answer: Yes, ma'am.

13 "Question: And to do that, you had to
14 look at the complete length of each hair that
15 had been mounted, right?

16 "Answer: Yes, ma'am.

17 "Question: And that process took many
18 hours to a couple of days per hair.

19 "MR. FERGUSON: You mean to look at
20 the length, you mean?

21 "Question: To build up a range of
22 characteristics in each hair by looking at it
23 from root to tip?

24 "Answer: Yes, ma'am.

25 "Question: And it was your practice to



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2 build the information up before you dive into
3 a comparison?

4 "Answer: Yes, ma'am.

5 "Question: And that's what you did in
6 this case?

7 "Answer: Presumably.

8 "Question: And even once you've built up
9 a range of microscopic characteristics in the
10 known hairs, you don't have anything to
11 report in terms of finding a microscopic
12 comparison because you still haven't done one
13 yet?

14 "Answer: That's correct.

15 "Question: And even once you've built up
16 a range of microscopic characteristics from
17 the 80 questioned hair slides, once you look
18 from root to tip at each one of those hairs,
19 you don't have anything to report about the
20 microscopic comparison because you haven't
21 done one yet, right?

22 "Answer: I'm not so sure that's the
23 procedure that was used here.

24 "Question: Well, was it your practice to
25 build up the characteristics before engaging



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2 in the comparison?

3 Eventually, he says here, "I don't
4 remember exactly what I did 21 years ago.

5 MR. FERGUSON: Can you read the
6 questions and answers please?

7 MR. SCHECK: Yes.

8 MR. SCHECK:

9 Q. Let me start reading again.

10 Let me phrase this question clearly. Let
11 me start at page 70, line 16.

12 "Question: Once you get to the
13 microscopic phase of an examination in this
14 case, you built up a profile of microscopic
15 characteristics for these hairs, right?

16 "Answer: Yes, ma'am.

17 "Question: And that process took many
18 hours to a couple of days per hair?

19 "MR. FERGUSON: You mean to look at
20 the length you mean?

21 "Question: To build up a range of
22 characteristics by looking at it from root to
23 tip?

24 "Answer: Yes, ma'am.

25 "Question: And that was your practice to



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2 build that information up before you just
3 dive into a comparison?

4 "Answer: Yes, ma'am.

5 "Question: And that's what you did in
6 this case?

7 "Answer: Presumably."

8 Do you see that?

9 A. I do.

10 Q. "Question: And even once you've
11 built up a range of microscopic
12 characteristics in the known hairs, you don't
13 have anything to report in terms of finding a
14 microscopic comparison because you still
15 haven't done one yet, right?

16 "Answer: That's correct."

17 Is that testimony consistent with your
18 understanding of how the microscopic hair
19 comparisons proceeded in this case.

20 A. It's consistent with, you know, I
21 can't say that I had that specific or have
22 that specific a recollection 25 years later
23 as to how he did it. It sounds like he
24 doesn't have that specific a recollection of
25 it 25 years later.



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2 Q. Do you know enough about this
3 process now?

4 A. Not for this level of detail, no.

5 Q. But would you not agree that the
6 testimony here is that even after mounting
7 the 80 slides and the known hairs, that the
8 microscopist has to do an examination under
9 the microscope of different sections of the
10 hair in order to build up a basis form making
11 a statement about a result?

12 MR. FERGUSON: Note my objection.

13 MR. SEPE: Note my objection as to
14 form to the questioning of this witness
15 on opining about the prior testimony of
16 an expert.

17 You can answer.

18 THE WITNESS: My understanding is
19 that after he does a gross examination of
20 the hairs without a microscope, he needs
21 to examine the hairs under the
22 microscope.

23 MR. SCHECK:

24 Q. He has to mount them?

25 A. But then he has to examine them



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1 Klein
2 under a microscope. That much I would agree
3 with. Any more detail, I'm not familiar
4 with.

5 Q. But you see that what the testimony
6 here is about the process?

7 A. I see this is his deposition of his
8 testimony 25 years ago.

9 Q. But that's the process.

10 A. That's up to him. I don't know. I
11 wasn't involved in the case back then.

12 Q. But you don't question his
13 testimony about hair microscopy, do you?

14 MR. SEPE: You're asking if he
15 questions the accuracy of it?

16 MR. SCHECK: I'll withdraw that.

17 MR. SCHECK:

18 Q. Look at page 42, 43. Page 42, line
19 20.

20 "Question: Now, in March and April and
21 May of 1985, after the collection of hairs
22 from the van, you had other case work that
23 you were working on, right, in other cases?

24 "Answer: Yes

25 "Question: And the work you did on



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1 Klein
2 examining and mounting and comparing the
3 hairs in this case was interspersed with the
4 work you did on those other cases?

5 "Answer: Correct."

6 Do you see that?

7 A. Yes.

8 Q. So you understand at the deposition
9 Fraas is saying after he started working on
10 the hairs on March 27th, he still had other
11 things to do, other cases, correct?

12 A. It seems so.

13 MR. SCHECK: Do you want to take a
14 five-minute break?

15 (Recess taken.)

16 MR. SCHECK:

17 Q. I'm calling your attention to
18 Mr. Fraas' deposition at page 1770, line 25
19 at the bottom of the page.

20 MS. CORNWALL: It's Deposition
21 Exhibit 4. It's Mr. Fraas' testimony
22 from the 2005 retrial of Mr. Kogut.

23 MR. FERGUSON: What are we reading,
24 the deposition page?

25 MS. CORNWALL: This has been



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1 Klein
2 previously marked as Deposition
3 Exhibit 4.

4 MR. FERGUSON: Trial testimony from
5 which time?

6 MR. SCHECK: This is the retrial.

7 MR. FERGUSON: 2005?

8 MS. CORNWALL: 2005, yes.

9 MR. SCHECK:

10 Q. This is the testimony of Mr. Fraas
11 at the Kogut retrial.

12 Do you have that in mind?

13 A. I didn't hear it.

14 Q. I'm just starting at page 1770,
15 line 25.

16 "Question: Now, I'm getting from you
17 that this is a particularly time consuming
18 process. The examination of individual hairs
19 and the envelopes and then making the
20 determination whether or not you're going to
21 mount them and then mounting them, and
22 looking at them under the microscope,
23 correct?

24 "Answer: Yes, sir. It's not time
25 consuming if there's one hair in there. You



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2 open it up, there's one hair, you know.

3 It would take, you know, 15 minutes,
4 possibly, to mount that and let the Permunt
5 set, and put your cover slip on it. If you
6 open up the envelope, and there's numerous
7 hairs in there and you have to filter through
8 debris, it's going to take more time."

9 Do you see that?

10 A. Yes.

11 Q. I think we've just reviewed
12 testimony that Mr. Fraas says he mounted 80
13 hairs in this case.

14 Do you recall that?

15 A. I remember 80 hairs, yeah.

16 Q. So if it were to take him
17 15 minutes per hair and there's 80 hairs, per
18 hour, there would be four hairs.

19 Altogether, 20 hours?

20 A. Sounds right to me.

21 Q. Let's go back to Mr. Fraas'
22 deposition, still Exhibit 4, page 93, line
23 13.

24 Are you looking?

25 A. Right.



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2 Q. "Question: Now, you had to mount
3 the slides, you had to do the profile, you
4 had to determine which hairs could go on the
5 slides. Do you have any sense how long that
6 process took you to complete for getting the
7 comparisons?

8 "Answer: I only know that I put a great
9 deal of work in it, so days to weeks.

10 "Question: Days to weeks to do that?

11 "Answer: To do the whole case.

12 "Question: To do the whole case. So is
13 it your testimony that you could have
14 accomplished this all in three or four days,
15 or it might have taken you four or
16 five weeks?

17 "Answer: Three or four days could have
18 been -- don't see how I could have possibly
19 done it. There's a lot of work here
20 counselor."

21 Okay?

22 A. Yes.

23 Q. Have that in mind?

24 A. Yeah, that's what he said.

25 Q. Now, let's take a look at



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2 Mr. Volpe's deposition, page 172, line two.

3 A. Can I ask a question?

4 MR. SEPE: Why don't you ask me a
5 question?

6 (Discussion held off the record.)

7 THE WITNESS: On advice of counsel,
8 I'll withdraw.

9 MR. SCHECK:

10 Q. I take it you're wondering what the
11 point of all this is?

12 A. That's a good question.

13 Q. We're going to get there?

14 (Discussion held off the record.)

15 Q. Let's start actually on page 171,
16 line 20.

17 You understand this is Mr. Volpe's
18 deposition?

19 A. Okay.

20 Q. "Question: Maybe I'll restate that
21 question because I think you said you have no
22 memory of any conversation with Fraas about
23 the hair; is that right?

24 "Answer: Specifically about the hair, I
25 don't recall.



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2 "Question: Okay. So as you sit here
3 today, do you have any independent
4 recollection of some unusual conversation
5 with Mr. Fraas where he called you up right
6 away about the results from his hair
7 examination?

8 "Answer: No, I don't."

9 MR. SEPE: Is there a question as
10 to --

11 MR. SCHECK:

12 Q. Do you see that?

13 A. I do.

14 Q. Let's turn to page 220. Actually,
15 221, line 18.

16 "Question: So let's just review this.
17 When I asked you before whether you had any
18 recollection about having conversations with
19 Fraas about the hair comparisons or having
20 any unusual comments or statements from him,
21 hey, we got a result, you didn't remember
22 anything, right?

23 "Answer: No, I didn't."

24 Have you got that in mind?

25 A. Yes.



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2 Q. Let's go back to the exhibit for
3 the search warrant, Exhibit 177.

4 A. The eavesdropping?

5 Q. Yes, this is the eavesdropping. I
6 ask you to look at Mr. Volpe's affidavit at
7 paragraph ten.

8 A. Okay.

9 Q. You have it in mind that this
10 application is being made on March 29th; do
11 you see that?

12 A. Yes.

13 Q. This is an affidavit that's being
14 made in support of it, correct?

15 A. Yes.

16 Q. And in reviewing Mr. Fraas'
17 testimony here right now, would you not agree
18 that he has stated, based on all the time it
19 would take to do a gross visual examination
20 of the hairs, mounting the hairs on a slide,
21 doing microscopic examination, that it would
22 not have been possible to do all of that and
23 give a result within three or four days?

24 MR. SEPE: Objection to form.

25 THE WITNESS: I can't answer that.



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Klein

MR. SCHECK:

Q. I'm asking you, did we review that together, that Mr. Fraas said that?

A. I don't remember him saying that, that it would not be possible.

Q. All right.

Do you want to go back --

A. I remember him saying at the end that he didn't even remember certain things about it. So what's possible or what's not possible, I don't --

Q. Let's go back, Mr. Klein, to the transcript I think I just read you.

MS. CORNWALL: Exhibit 4, the retrial transcript.

MR. SCHECK:

Q. We agree that even to mount hairs would take --

A. We haven't agreed with anything. I only agreed what you read out of a deposition is accurate.

Q. So let's go back again to what I read you.

You want to look again?



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2 A. What are we talking about now?

3 Q. This is his testimony.

4 A. Fraas?

5 Q. Yes, at the retrial. Let's take a
6 look at page 1793.

7 A. Okay.

8 Q. Starting at line 13.

9 "Question: Now, you had to mount the
10 slides, you had to do the profile, you had to
11 determine which hairs would go on the slides.
12 Do you have any sense of how long that
13 process took you to complete, for getting the
14 comparison?

15 "Answer: I only know I put a great deal
16 of work in it, so days to weeks.

17 "Question: Days to week to do that?

18 "Answer: To do the whole case. So is it
19 your testimony that you could have
20 accomplished this all in three or four days,
21 or it might have taken you four or
22 five weeks?

23 "Answer: Three or four days -- don't see
24 how I could possibly have done it. There's a
25 lot of work here, counselor."



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2 Do you see that?

3 A. Yes.

4 Q. So would you agree that in the
5 retrial, certainly, Fraas is saying that to
6 complete this microscopic hair comparison, he
7 couldn't possibly have done it in three to
8 four days.

9 MR. SEPE: Objection to the form as
10 it asks him to characterize the testimony
11 of an expert witness at a prior trial
12 from a fact witness.

13 But if you understand the question,
14 you can answer it.

15 THE WITNESS: It says what you just
16 read, what he meant by it, and did he
17 mean, what he meant by the full
18 examination, I don't know, but you're
19 reading it accurately.

20 MR. SCHECK:

21 Q. Well, taking a look at paragraph
22 ten --

23 A. Yes.

24 Q. -- of the Affidavit, it says here,
25 "On March 27th, 1984, Nassau County



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2 Judge Lawrence signed an Order authorizing
3 the seizure of the above described van to wit
4 1977 Ford van, blue in color, New York
5 registration 3525 BCG operated by John
6 Restivo during the murder of Theresa Fusco.
7 A search of that van has produced hair
8 consistent with Theresa Fusco and possible
9 human blood."

10 Do you see that?

11 A. Certainly.

12 Q. If Fraas could not have completed
13 the process in three or four days of mounting
14 the 80 slides of hairs that were recovered
15 from Restivo's van, it would be fair to call
16 those the questioned hairs?

17 A. The hairs from Restivo's van?

18 Q. Yes.

19 A. Yes.

20 Q. Those are known as questioned
21 hairs?

22 A. Yes.

23 Q. Mounted the questioned hairs, 80
24 slides; compared those to the known hairs
25 from Theresa Fusco; and produced a result



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2 that hairs were found in the van that were
3 consistent with Theresa Fusco, that could not
4 have been done within three or four days.

5 Are you with me?

6 A. Yes.

7 Q. Then wouldn't you agree it would be
8 impossible for Detective Volpe to swear in an
9 affidavit on March 29th that a search of the
10 van produced hair consistent with Theresa
11 Fusco's?

12 MR. SEPE: Objection to form.

13 MR. FERGUSON: Note my objection.

14 THE WITNESS: No.

15 MR. SCHECK:

16 Q. Well, it wouldn't be impossible if
17 he had planted a hair from Theresa Fusco, a
18 known hair, either in the van or in the
19 envelope of questioned hairs that Fraas was
20 examining, right?

21 MR. SEPE: Objection to form.

22 THE WITNESS: I'm not following
23 that question at all.

24 MR. SCHECK:

25 Q. If Detective Volpe, right, had



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taken a known hair from Theresa Fusco --

A. From the autopsy.

Q. From her body?

A. Right.

Q. There were known hairs collected, right?

A. Right.

Q. If he had taken a known hair and put it in an envelope where the questioned hairs were kept or put it in the van, if he had done that, then he would know on March 29th that a hair consistent with Theresa Fusco would be found in a search of the van; fair enough?

MR. SEPE: Objection to form.

THE WITNESS: You know, I see what your question is, but I don't know where Volpe is getting this information from in his affidavit. He certainly, if he had taken hair from the autopsy and put it in the van, he would certainly know it's in the van.

Whether he would know if somebody would find it or not is a completely



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2 different issue, and that's what he says
3 here, "the search of the van has produced
4 hair consistent with Theresa Fusco."

5 MR. SCHECK:

6 Q. In this affidavit there's no
7 question he's saying that "a search of the
8 van has produced hair consistent with Theresa
9 Fusco."

10 A. That's what he says.

11 Q. There's no doubt about it in your
12 mind that he's telling the Judge, we looked
13 in the van, we searched the van, and we came
14 out with a hair that's consistent with that
15 of the deceased, right?

16 MR. SEPE: Just to be clear, we're
17 asking the witness to testify as to what
18 another witness meant.

19 MR. SCHECK:

20 Q. This is what the application says,
21 doesn't it?

22 A. A search of that van, presumably by
23 the Nassau County Police Department, it's
24 clear that's what he's talking about, has
25 produced hair consistent with Theresa



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2 Fusco's.

3 Q. Right.

4 MR. FERGUSON: And possible blood,
5 right?

6 THE WITNESS: Whatever. That
7 doesn't seem to be the focus of this.

8 MR. SCHECK:

9 Q. I asked you a question in a
10 compound way. Let me break it down.

11 A. Sure.

12 Q. If Detective Volpe had taken a
13 known hair recovered from Theresa Fusco's
14 body and put it in the envelope that
15 contained the questioned hairs that were
16 retrieved from John Restivo's van sometime
17 between March 26th and March 29th, then he
18 could state with assurance before the
19 microscopic hair examination was completed
20 that a hair consistent with Theresa Fusco's
21 would be found in the van?

22 MR. SEPE: Objection to form.

23 MR. FERGUSON: Just note my
24 objection.

25 THE WITNESS: Assuming that the



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2 microscopist accurately finds that hair
3 in their examination, yes.

4 MR. SCHECK:

5 Q. I think if I understood, another
6 possibility is for Volpe to have actually
7 planted a known hair in the van?

8 A. That's your suggestion.

9 Q. No, I'm just saying.

10 A. Right.

11 Q. I think you were saying just a
12 second ago that planting hair in the van
13 itself, if one were interested in hair
14 planting, would be a bit riskier than just
15 putting the hair in the envelope of
16 questioned hairs recovered from the van?

17 A. Riskier for who, what do you mean
18 riskier?

19 Q. A little riskier that it wouldn't
20 be discovered, correct?

21 A. Right. That's common sense.

22 Q. But by putting it in the envelope
23 of questioned hairs, that would present a
24 greater opportunity, certainly, for the hair
25 microscopist to find the hair and make the



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2 judgment that a hair consistent with Theresa
3 Fusco's was recovered in the van?

4 MR. SEPE: Objection to form.

5 Do you understand the question?

6 THE WITNESS: I think so.

7 It would narrow down the universe
8 of questioned hairs, yes.

9 By the way, I don't say that that's
10 the only explanation for this affidavit.

11 MR. SCHECK:

12 Q. I was just going to ask you.

13 Were you aware of any potential
14 contradiction between Fraas' testimony as to
15 when the microscopic comparison was complete
16 and the submission of this affidavit for a
17 wiretap extension?

18 A. No.

19 Q. At the time of trial?

20 A. No.

21 Q. And I take it this is the first
22 time that this issue has been brought to your
23 attention?

24 A. I believe so. I don't know that
25 there is a distinction, but --



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2 Q. Well, I'm speaking about the issue.

3 A. The issue, yes.

4 Q. And you understand the issue to be
5 that, based on the testimony of Fraas about
6 how long it would have taken him to do the
7 microscopic hair comparisons, that testimony
8 that I've read you is inconsistent with Volpe
9 being able to state in an affidavit on
10 March 29th that a hair consistent with
11 Theresa Fusco's had been recovered from the
12 van?

13 MR. SEPE: Objection to form.

14 THE WITNESS: Do I answer?

15 MR. SEPE: You can answer, yes.

16 THE WITNESS: I don't see it.

17 MR. SCHECK:

18 Q. Tell me why you think that is
19 inconsistent?

20 A. Number one, it's not clear where
21 Volpe is getting that information from.
22 Number two, let's assume he's getting it from
23 Fraas; he's not saying that a microscopic
24 comparison has resulted in that conclusion.

25 I don't know what it's based on. I don't



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2 know if it's based on Fraas' preliminary
3 look. I don't know if some other supervisor
4 in the Bureau looked at the hairs and came up
5 with that.

6 You know, there's so many variables in
7 here based on that one sentence that I see
8 very many possibilities.

9 Q. Mr. Klein, do you recall my reading
10 testimony to you from Mr. Fraas that he did
11 not then and in his practice make any
12 conclusions about similarity or dissimilarity
13 just from doing a gross examination of the
14 hairs; do you remember that?

15 MR. FERGUSON: Just note my
16 objection.

17 This is argumentive, this line of
18 questioning.

19 MR. SCHECK:

20 Q. Do you remember that?

21 A. I remember the testimony.

22 Q. Do you remember him testifying that
23 he could not issue a result about hairs being
24 consistent or a microscopic comparison until
25 he actually finished the microscopic



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2 comparison of the questioned hairs and the
3 known hairs, correct?

4 A. This is depending upon what he's
5 talking about consistent.

6 Is he talking about a full microscopic
7 analysis, or is he talking about a visual
8 comparison?

9 I don't know. You know, you read it to
10 me. I don't recall every single word he
11 said.

12 All I can tell you is from my looking at
13 this affidavit, to me it's not inconsistent
14 that Volpe has apparently said that the
15 search of the van produced hair consistent
16 with Theresa Fusco's. I don't know what
17 Volpe means when he says consistent, I don't
18 know where he's getting his information from,
19 I don't know what the person meant when they
20 said it's consistent.

21 You're asking me to give my opinion on
22 something that has several different answers.

23 Q. I was just asking, you were very
24 familiar with this case, right?

25 A. I was 25 years ago.



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2 Q. You were familiar through the
3 retrial of John Kogut, right?

4 A. Less, somewhat.

5 Q. Let's just examine it.

6 The term hair being consistent with that
7 of Theresa Fusco, isn't that the way hair
8 microscopists would describe their
9 conclusion?

10 MR. FERGUSON: Just note my
11 objection.

12 MR. SEPE: I'm going to object
13 also.

14 Again, he's being asked, one, to
15 give an opinion as to what is meant by
16 the word "consistent"; two, now we're
17 getting into asking a fact witness to
18 give an opinion as to a prior expert
19 witness' testimony, either in trials or
20 depositions, and if that is the case,
21 respectfully, he's entitled to a much
22 bigger of a check.

23 So to the extent we're going to ask
24 him to opine on Fraas or anyone else's
25 scientific testimony, I object to that.



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2 MR. SCHECK:

3 Q. Let me be clear. I think you told
4 us before that you had an understanding,
5 certainly, at the time of the trial
6 sufficient to present the microscopic hair
7 evidence in this case, right?

8 A. Correct.

9 Q. You reviewed the microscopic hair
10 evidence during the reinvestigation, correct?

11 A. I didn't.

12 Q. But you were aware of discussion of
13 it, correct?

14 A. Yes.

15 Q. And you were supervising
16 Mr. Biancavilla on the retrial, right?

17 A. Yes.

18 Q. And during the retrial, there was
19 some considerable litigation, was there not,
20 about whether or not this hair was planted in
21 the van?

22 A. There was.

23 Q. And there was testimony from Fraas
24 about the microscopic examination, right?

25 A. There was. I mean, I'm reading it,



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1 Klein
2 so apparently there was.

3 Q. In terms of your understanding,
4 let's start with 1986.

5 When a hair microscopist expressed an
6 opinion about a questioned hair and a known
7 hair, would not the form of the opinion be
8 that the questioned hair is consistent with
9 the known hair, correct?

10 MR. FERGUSON: Note my objection.

11 THE WITNESS: My understanding is,
12 at least back in that time, that as far
13 as the science of hair microscopy is
14 concerned, the closest the analyst can
15 come towards drawing a positive
16 conclusion in a formally written report
17 is that the hair is consistent, the known
18 hair is consistent with the questioned
19 hair. That's my understanding.

20 MR. SCHECK:

21 Q. So your understanding, I take it,
22 back in 1986, and to the moment you sit here
23 today, is that the way the hair microscopist
24 testimony would come in at a trial is that
25 the hair microscopist might say we exclude



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2 the known hair as --

3 A. The questioned hair.

4 Q. The questioned hair, or at best
5 they could say that the known hair and the
6 questioned hair were consistent with each
7 other, correct?

8 A. Within the rules of evidence and
9 the science of microscopy, I agree with you.

10 Q. And the limits of hair microscopy
11 was known in 1986 to homicide detectives, to
12 the best of your knowledge, right?

13 MR. FERGUSON: Note my objection.

14 MR. SEPE: Objection to form.

15 THE WITNESS: I can't say that. I
16 can assume it. I can't say it.

17 MR. SCHECK:

18 Q. Well, homicide detectives you knew
19 were dealing all the time with microscopic
20 hair examination to make their cases, weren't
21 they?

22 A. Yes.

23 Q. And you would certainly expect that
24 the lead homicide detective in a case would
25 have some understanding as to what the limits



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2 were of hair microscopy examination?

3 MR. SEPE: Objection as to form.

4 THE WITNESS: I can't say that.

5 MR. SCHECK:

6 Q. You don't think --

7 A. I think it depends upon the
8 detective. It depends upon the hair.

9 You're asking for things in a void. I
10 don't give general answer to something of
11 this importance.

12 Q. Was there anything about Detective
13 Volpe that struck you that he was a
14 particularly ignorant homicide detective?

15 A. I wouldn't say he was ignorant, no.

16 Q. So do you have any reason to
17 believe that Detective Volpe would not know,
18 in 1986, what the limits were of hair
19 microscopy?

20 MR. SEPE: Objection as to form.

21 THE WITNESS: I have no idea.

22 MR. SCHECK:

23 Q. Do you have any reason to believe
24 he wouldn't know that?

25 MR. SEPE: Objection as to form and



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2 asked and answered.

3 THE WITNESS: He's not a lawyer,
4 he's not a trained microscopist, and you
5 would have to ask him.

6 I don't believe I ever had the
7 discussion with him where he told me I
8 understand all this stuff.

9 MR. SCHECK:

10 Q. Let he ask you this.
11 District attorneys doing homicide cases,
12 in 1986, knew the limits of hair microscopy
13 testimony, right?

14 MR. SEPE: Objection as to form.

15 THE WITNESS: Again, I can answer
16 for myself, and I learned it in this
17 case. Maybe a case before this, but I
18 don't know.

19 MR. SCHECK:

20 Q. One would expect that district
21 attorneys dealing with homicide cases would
22 know something about the limits of hair
23 microscopy testimony?

24 A. If they had a hair case, I would
25 expect that.



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2 Q. Would you not agree, just looking
3 now at paragraph ten of Volpe's affidavit,
4 when he says, "A search of that van has
5 produced hair consistent with Theresa
6 Fusco's," right, that's as far as a hair
7 microscopist could go, a statement that the
8 hair was consistent with hers, right?

9 MR. SEPE: Note my objection.

10 MR. FERGUSON: Note my objection.

11 THE WITNESS: I don't know that
12 that's the way Volpe using the term.

13 MR. SCHECK:

14 Q. I didn't ask you that question.

15 A. You are asking the question that
16 way.

17 Q. Please listen to my question.

18 MR. FERGUSON: You are asking that
19 question.

20 Q. As of 1986, to the best of your
21 knowledge, the furthest a hair microscopist
22 could go in terms of a statement about
23 whether a questioned hair and a known hair,
24 about the comparison, the best they could do
25 was to say that the questioned hair and the



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2 known hair were "consistent" with each other,
3 right?

4 MR. SEPE: Objection as to form,
5 and, again, asking a fact witness for an
6 expert opinion on a scientific issue.

7 If you understand the question, you
8 can answer it.

9 THE WITNESS: I do.

10 MR. SCHECK:

11 Q. That's correct, right?

12 A. That's correct.

13 Q. Judges, they were dealing with hair
14 microscopy testimony all the time?

15 A. Please, you ask me about
16 detectives. I have no idea about judges.

17 Q. Did you know Judge Leff?

18 A. Larry Leff is the Chief Assistant
19 of the DA's Office.

20 Judge Lawrence?

21 Q. Did you know Judge Ane?

22 A. Judge Stewart Ane.

23 Q. Smart judge?

24 MR. SEPE: Objection.

25 THE WITNESS: I'll let the record



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2 reflect as to his degree of intelligence.

3 I'm not going to get into commenting on
4 judges' intelligence.

5 MR. FREEMAN: You mean his record,
6 not this record?

7 THE WITNESS: I'm not getting into
8 that.

9 MR. SCHECK:

10 Q. Well, assuming that the Judge
11 before whom this wiretap extension order was
12 brought had knowledge of the limits of
13 microscopic hair examination, are you with
14 me?

15 A. Yes.

16 Q. Would not a statement that a search
17 of that van produced hair consistent with
18 Theresa Fusco's have evidentiary significance
19 for purposes of extending the wiretap
20 application?

21 MR. SEPE: Objection to form.

22 THE WITNESS: I have no idea.

23 MR. SCHECK:

24 Q. Would you not agree that the
25 purpose of having Detective Volpe give an



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2 affidavit was to convince the Judge to extend
3 the wiretap?

4 A. I can't say what his purpose was.
5 I wasn't involved in the case then.

6 Q. But wasn't this an application to
7 extend the wiretap?

8 A. That's what it's titled.

9 Q. So in your mind an application to
10 extend the wiretap was your understanding, in
11 1986, and as you sit here today that the
12 prosecution has to make a showing that
13 they've gathered evidence sufficient to
14 continue the wiretap, right?

15 A. Or that there's some reason to
16 continue the wiretap, whether they gathered
17 evidence or not.

18 Q. Right.

19 And would you not agree that one purpose
20 of Detective Volpe's affidavit with respect
21 to stating the results of the search of the
22 van was to try to persuade the Judge to
23 extend the wiretap application?

24 A. I just think that I can't comment
25 on that. I wasn't involved in it. You're



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2 making a big assumption.

3 MR. SEPE: I think the problem is
4 once we ask the witness to get into the
5 mind of a judge or a detective or a
6 scientist as to anything, we're just
7 creating questions, forget about raising
8 objections, that are going to take time.

9 MR. SCHECK: All of these
10 questions, just so you know, Counsel and
11 Mr. Klein, I'm asking you these questions
12 with respect to the knowledge of the
13 customs and the practices of the District
14 Attorney's Office and the Court system in
15 1986.

16 MR. SCHECK:

17 Q. Do you have that in mind?

18 MR. FERGUSON: Just note my
19 objection.

20 There isn't any foundation for the
21 customs and practice of the Court system.

22 MR. SCHECK:

23 Q. Were you familiar with the customs
24 and practice of the Court system, in 1986,
25 when you working as a District Attorney?



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2 MR. FERGUSON: Note my objection.

3 THE WITNESS: Somewhat.

4 MR. SCHECK:

5 Q. You were familiar with the process
6 of making an application to get a search
7 warrant, were you not?

8 A. Yes.

9 Q. You were familiar with at least the
10 process by which a district attorney would
11 make an application to extend a wiretap
12 application?

13 A. To a certain extent, but I had
14 never done one.

15 Q. Without having done one, would you
16 agree that you were familiar with the general
17 process of what had to be done?

18 A. To a certain extent.

19 Q. And based on your understanding of
20 how that worked, in 1986, would you not agree
21 with me that one of the purposes of having a
22 detective in a case fill out an affidavit in
23 support of an extension of the wiretap
24 warrant was to give evidence to the Judge
25 about the investigation that would persuade



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2 the Judge to continue the wiretap, right?

3 A. As a general matter, yes.

4 Q. And based on the customs and the
5 practices at the time as you understood them,
6 in 1986, would you not agree with me that was
7 one of the purposes of having Volpe fill out
8 this affidavit and talk about what was found
9 in Restivo's van?

10 A. I have no idea.

11 Q. You have no idea?

12 A. No, I don't.

13 Q. I just want to call your attention
14 to the Fraas deposition of page 78?

15 MR. SEPE: I'm sorry, what page?

16 MR. SCHECK: Page 78, line 3.

17 MR. SCHECK:

18 Q. "Question: But you were the only
19 hair examiner in the lab in the 1980s, right?

20 "Answer: That's correct."

21 Do you see that?

22 A. Yes, I do.

23 Q. "Question: So you didn't have any
24 peer reviewer in this case?

25 "Answer: We didn't have any peer review



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2 program to my knowledge.

3 "Question: Are you familiar with the
4 idea of a technical review or a supervisor
5 review of hair work?

6 "Answer: No, ma'am.

7 "Question: So it was not your practice
8 to have any supervisor review your work or
9 your findings in hair cases at the SIV, was
10 it?

11 "Answer: No, ma'am.

12 "Question: So Supervisor Muller did not
13 review your hair comparisons?

14 "Answer: Not to my knowledge. You'd
15 have to ask Supervisor Muller.

16 "Question: Well, you didn't hand your
17 slides over to him to look at, did you?

18 "Answer: No, ma'am."

19 So do you remember whether there was
20 anyone other than Mr. Fraas who was doing
21 hair examination in 1986 at the SIV?

22 A. I don't remember. I don't think I
23 would have known then, Mr. Scheck.

24 (Discussion held off the record.)

25 (Recess taken.)



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2 MR. FREEMAN: Mr. Ferguson, my
3 co-counsel, has left the proceedings as a
4 result of a medical issue he was having,
5 and he'll be unavailable for the rest of
6 the afternoon. We have decided to
7 continue, and we would like to deposition
8 to proceed now as planned.

9 MR. SCHECK:

10 Q. Mr. Klein, I want to see if I
11 understood an answer that you gave before,
12 okay?

13 A. Yes.

14 Q. About the reasons you believe,
15 based on your knowledge of the custom and
16 practices of the District Attorney's Office
17 in 1986, that Detective Volpe might have put
18 into this affidavit the statement that a
19 search of the van produced hair consistent
20 with Theresa Fusco's, okay?

21 A. Okay.

22 Q. I think you said, first, you didn't
23 know what Volpe might have meant by the
24 statement, "hair consistent with Theresa
25 Fusco's; is that correct?



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2 A. Yes.

3 Q. By that you mean that Volpe might
4 not have understood the limits of microscopic
5 hair comparison, and when he used the word
6 "consistent" he did not mean that the hair
7 had been examined by a microscopist and found
8 to be consistent with Theresa Fusco's?

9 MR. SEPE: Well, that's
10 characterizing testimony as to questions
11 he was asked about what someone else
12 meant.

13 MR. SCHECK: He gave an answer, and
14 I want to know what he meant.

15 MR. SCHECK:

16 Q. Is that not one of the things you
17 said?

18 A. Not the way you said it, no. What
19 I meant that he meant was whether he's using
20 the phrase "consistent with" in the same
21 manner as a microscopist filing an official
22 report.

23 Q. I think we reviewed this, but based
24 on your understanding in 1986 and until
25 today, when a statement is made that a hair



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2 is consistent with somebody's, that is as far
3 as a hair microscopist can go, correct?

4 MR. SEPE: Same objection.

5 THE WITNESS: Yes.

6 MR. SCHECK:

7 Q. So, if I understand it, you're
8 saying that one possibility is that Volpe
9 didn't understand what hair microscopists do,
10 and he might have been saying here that the
11 hair was consistent with Theresa Fusco's
12 based on something other than a statement
13 from Fraas, correct?

14 A. That's really asking two questions,
15 two answers in one. Those are two
16 possibilities for why Volpe is doing that.

17 Either, one, he didn't understand, or,
18 number two, he did understand, but he wasn't
19 using that phrase as a microscopist would in
20 filing an official report. He could have
21 very well understood what a microscopist is
22 capable of doing, but when he used the words
23 "consistent with," it maybe wasn't based upon
24 that full examination, or he didn't use the
25 words as a microscopist would use it.



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2 So there are a variety of different
3 explanations for it. I don't know which one
4 is true.

5 Q. Let's just examine them for a
6 second.

7 In terms of the custom and practices of
8 the District Attorney's office and homicide
9 detectives, as you understood them in 1986,
10 would a district attorney append an affidavit
11 from a detective that did not have a proper
12 factual basis?

13 A. They shouldn't.

14 Q. Would you not agree with me that in
15 1986, before stating to a judge that a hair
16 was found in the van that was consistent with
17 Theresa Fusco's, the only proper basis for
18 making that statement would have been a
19 report, formal or informal, from a hair
20 microscopist?

21 MR. SEPE: Objection.

22 THE WITNESS: I disagree with you.

23 MR. SCHECK:

24 Q. You disagree with that?

25 A. Yes.



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2 Q. You're saying that, as a district
3 attorney in 1986, it would have been proper
4 to say that hair was consistent with Theresa
5 Fusco's based on a detective just looking at
6 the hairs, him or herself?

7 A. I'm saying that that is included
8 within the term "a search of the van has
9 produced hair consistent with." He didn't
10 say a search of the van analyzed by a hair
11 microscopist, so I don't know, Mr. Scheck, I
12 don't know.

13 Q. I'm asking you --

14 A. The statement is not clear enough
15 for me to conclusively agree with your
16 statement.

17 Q. Well, have you ever heard of any
18 homicide detective looking at hairs collected
19 from vacuumings of a vehicle and saying,
20 based on his or her own visual, gross visual
21 examination of the hair, oh, those hairs are
22 consistent with the deceased?

23 A. I can say, I can't say specifically
24 in exact facts you gave, but I can say that I
25 have had homicide detectives make independent



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2 nonexpert analysis of evidence and come up
3 with opinions on them, yes, whether it's
4 ballistics or blood, I can't say specifically
5 hair, but I can't say I never had a case like
6 that either.

7 I mean, I can look at a hair and compare
8 it to something and exclude it, or I can look
9 at two hairs and say, you know, that's
10 consistent with or they look alike visually.

11 It doesn't have to be an expert opinion,
12 and I don't know in what context Volpe is
13 doing this in this affidavit since I wasn't
14 involved in the case then, I didn't prepare
15 the Affidavit, I didn't seek to Volpe about
16 it.

17 Q. You do understand the context of
18 this affidavit, don't you?

19 A. I know it was added to a request to
20 extend an eavesdropping order.

21 Q. You understand that much, right?

22 A. Yes, I do.

23 Q. You have no specific recollection,
24 in all your work on this case, which includes
25 the trial, the reinvestigation, and



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2 supervising the retrieval, of any information
3 that someone had made a determination that a
4 hair consistent with Theresa Fusco's was
5 found in the van within two days of the van's
6 recovery, and that is between March 27th and
7 March 29th?

8 A. I have no idea.

9 Q. You've never heard of anything like
10 that, have you?

11 A. I can't say I have or I haven't. I
12 don't remember.

13 Q. Well, I'm asking you now, do you
14 have a specific recollection of any evidence
15 in any way connected with this case that
16 somebody reported that hairs consistent with
17 Theresa Fusco were found in the van between
18 March 27th and March 29th, other than this
19 paragraph ten?

20 A. I wasn't involved in the case then.
21 I wouldn't have had any way of knowing.

22 Q. You did a reinvestigation of this,
23 did you not?

24 A. Well, I also tried the case, but in
25 that period of time, I wasn't involved in it.



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2 So whether someone did that, I wouldn't know.

3 Q. Mr. Klein, when you tried the case,
4 you familiarized yourself with things that
5 happened in the case prior to the time you
6 took it over?

7 A. That's true.

8 Q. That's something you would do in
9 trying the case, wouldn't you?

10 A. That's true.

11 Q. So you familiarized yourself with
12 the wiretaps, right?

13 A. That's true.

14 Q. And how they came to get the
15 wiretaps?

16 A. Yes.

17 Q. When you were involved in the
18 reinvestigation of the case, that involved
19 some examination of things that happened
20 before you were assigned this matter?

21 A. I assume so. I really can't
22 specifically remember the reinvestigation,
23 the time periods.

24 Q. Well, a lot of this reinvestigation
25 focussed on the DNA and the hair, right?



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2 A. Well, subsequent analysis of it,
3 yeah. DNA wasn't even heard of when we tried
4 the case.

5 Q. But the examination of semen and
6 hair that was recovered from the body, all
7 that happened before you were assigned to the
8 case, right?

9 A. That's what I'm saying.

10 Q. And, nonetheless, you made it your
11 business, when you were the trial counsel and
12 during reinvestigation, to find out as much
13 as you could about what happened before you
14 were assigned the case, right?

15 A. That's true.

16 Q. Fair enough?

17 A. Yes.

18 Q. Based on your knowledge from being
19 trial counsel, having been involved in the
20 reinvestigation, and having supervised the
21 retrial, right, other than this statement in
22 paragraph ten in Volpe's affidavit on
23 March 29th, right, you have heard of no other
24 evidence, I take it, that somebody other than
25 Volpe said, ah, in substance or directly, we



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2 found a hair consistent with Theresa Fusco's
3 in the van?

4 A. I don't remember that.

5 Q. It also says here, "possible human
6 blood," in paragraph ten of this application,
7 right?

8 A. Okay.

9 Q. Does it?

10 A. It does.

11 Q. And in terms of the customs and
12 practices of the time, this would be, would
13 you not agree, a significant statement to a
14 judge that we found hair consistent with the
15 victim in the van and possible human blood in
16 the van, correct?

17 A. It would be information provided to
18 a judge.

19 Q. It would be significant information
20 for a judge to consider in extending a
21 wiretap application, fair enough?

22 A. It would be information for them to
23 consider.

24 Q. It would be the kind of information
25 that might induce a judge to continue the



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2 wiretaps because it would be showing that
3 progress was being made in the investigation;
4 fair enough?

5 MR. SEPE: Objection to form.

6 THE WITNESS: It's possible. It's
7 possible.

8 MR. SCHECK:

9 Q. Do you remember an officer named
10 Birdsall?

11 A. Yes.

12 Q. Who is he?

13 A. Wayne Birdsall?

14 Q. Yes.

15 A. I believe, back then (when I say
16 back then, I mean when I was investigating
17 and trying the case) I believe he was in the
18 Serology Department. He subsequently became
19 a sex crimes investigator, but I believe he
20 was a serologist when this case was going on
21 in 1985 and 1986.

22 Q. So, to the best of your
23 recollection, he would be the person who
24 would examine, let's say, the van to
25 determine the presence of semen or blood?



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2 A. He was one of them. I don't think
3 he was the only one, but, certainly, whether
4 he examined the van or whether he examined
5 evidence that was collected from the van, he
6 would be involved in serological research,
7 examination.

8 Q. Let's take a look at Volpe's
9 testimony. Let's turn to Mr. Volpe's
10 testimony at page 244, and starting, why
11 don't we start at line two.

12 "Question: All right. Let's go back to
13 the issue of human blood. Are you with me?

14 "Answer: I'm with you, yes.

15 "Question: Birdsall was the one that
16 processed the van, right?

17 "Answer: Correct.

18 "Question: So, Birdsall, if there were
19 possible human blood in the van, Birdsall
20 would have told it to you, right?

21 "Answer: No. He would have told it to
22 his supervisor.

23 "Question: Let's just go through the
24 possibilities. He might have told it
25 directly to you. That's one possibility?



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2 "Answer: He might have, yes.

3 "Question: And he might have told it to
4 his supervisor, who would then in turn told
5 it to you, right?

6 "Answer: Or told one of my supervisors.

7 "Question: Okay, now, you would not,
8 you're telling us, put in a warrant, this
9 affidavit of March 29th, that there was
10 possible human blood in the van unless you
11 had received that information from Birdsall
12 himself, Birdsall's supervisor or your
13 supervisor, right?

14 "Answer: Correct."

15 Do you see that?

16 A. That would be it, correct.

17 Q. Why don't we turn to Mr. Birdsall's
18 testimony in this case?

19 Let's look at page 71 starting at line
20 10.

21 A. This is Birdsall.

22 This is a deposition now?

23 Q. Yes.

24 "Question: Did you collect any blood
25 from the van?



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2 "Answer: No.

3 "Question: Did you see anything that was
4 possibly human blood in that van?

5 "Answer: No.

6 "Question: Did you conduct any
7 serological testing whatsoever on any part of
8 the van or anything collected from it?

9 "Answer: No.

10 "Question: Did you tell anybody you had
11 found anything that was possibly human blood?

12 "Answer: No.

13 A. Okay.

14 Q. Do you see that?

15 A. Yes.

16 Q. Now, would you not agree that it
17 was Birdsall's testimony that he didn't see
18 that there was anything that was possible
19 blood and he didn't tell any supervisor that
20 there was possible blood, and Volpe's
21 testimony that it would have been Birdsall
22 who would have given him the information
23 about the possibility of blood; do you have
24 that in mind?

25 A. Yes.



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2 Q. So does that seem contradictory to
3 you in terms of paragraph ten of the
4 Affidavit?

5 MR. SEPE: Objection to the form of
6 the question as the witness has been
7 shown selected portions of two other
8 deposition transcripts.

9 So, essentially, you're being asked
10 to answer a hypothetical. Assuming
11 everything Mr. Scheck just asked you, you
12 can answer that.

13 THE WITNESS: I can.

14 Do I answer that?

15 MR. SEPE: Yes.

16 THE WITNESS: I find the testimony
17 in 2009 somewhat contradictory. I don't
18 know that I find it contradictory with
19 the Affidavit from 1985 because 25 years
20 or 24 years have elapsed.

21 MR. SCHECK:

22 Q. While we're getting this report,
23 let me just ask you a question.

24 You were familiar with the defenses
25 raised, certainly, at the retrial of this



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2 case, were you not?

3 A. To a certain extent, yeah.

4 Q. And you were familiar with the
5 Affidavit that Mr. Petrocco put in for
6 purposes of vacating the conviction, do you
7 remember that?

8 A. At this point, no, I don't remember
9 it. Did I look at it at some point, perhaps,
10 but I don't have any recollection of it. I
11 know that he did switch sides.

12 Q. That's how you look at it, he
13 switched sides?

14 A. No. He testified as a prosecution
15 witness in the first trial. He testified as
16 a defense witness in the retrial. That's
17 what I meant.

18 Q. To your knowledge, did Mr. Petrocco
19 say anything at the retrial factually that
20 was different than he told you at the time of
21 the trial?

22 A. I didn't hear his testimony. My
23 understanding was that he had changed his
24 opinion somewhat, but, again, I didn't hear
25 it.



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2 Q. Have you reviewed your closing
3 argument in this case?

4 A. No.

5 Q. I'm going to show you Exhibit 108,
6 and this is a Report of Analysis or
7 Examination by Technician, from Birdsall, of
8 the van, dated March 26th at 1700 hours?

9 MS. CORNWALL: Referring you to
10 Sheet Number Six of the collective
11 reports of the exhibit.

12 MR. SEPE: I think it has 13093 and
13 it has a disclosure number on the bottom.

14 MR. SCHECK:

15 Q. Do you see it?

16 A. Yes.

17 Q. Take a look at it.

18 A. Okay.

19 Q. Now, you see that Birdsall is
20 reporting that "Numerous hairs were removed
21 from the carpet and floor of the van. Pillow
22 case, T-shirt and blankets were removed from
23 the van. Above items were forwarded to
24 Detective Fraas at 1800.

25 Do you see that?



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2 A. Yes.

3 Q. This was apparently filled out on
4 March 26th, 1985?

5 A. It says that -- you know this is --
6 yeah, I'll go along with that.

7 Q. And in terms of customs and
8 practices in 1986, to your knowledge, this
9 would be a report that would be filled out by
10 the serologist, Birdsall, as to what he found
11 when he examined John Restivo's van?

12 A. It's funny. I would have expected
13 this from a crime scene detective. So to me,
14 that would be the normal practice and
15 procedure, that a member of the Crime Scene
16 Unit would actually examine the van, and
17 probably with the assistance of serologists,
18 microscopists, but I don't know.

19 First of all, I don't know that the crime
20 scene guy wasn't there, but the fact that it
21 was done by Birdsall indicates to me that he
22 was probably the one who physically did it.
23 So it does surprise me as far as practices
24 and procedures.

25 Q. So this was a case where there was



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1 Klein
2 a search warrant affidavit. The van was
3 seized and it was taken and it was brought
4 right away to SIB for examination, right?

5 A. ESB, Emergency Services Bureau,
6 right.

7 Q. This report, in terms of the custom
8 and practices of the time, would be a report
9 by the serologist as to what he found in the
10 van on March 26th, right?

11 MR. SEPE: Objection to form.

12 MR. SCHECK:

13 Q. In terms of the customs and
14 practices.

15 A. Again, I disagree. My
16 understanding at that time was that a crime
17 scene detective would have actually done the
18 physical work, but if he says he did it, I
19 see the document, he apparently did it, but
20 you're asking me what the custom and practice
21 is, and that's not my understanding.

22 Q. Well, if there's a report that's
23 filled out by Birdsall, and he testified that
24 he was the person who went through the van to
25 find the hair, would you accept that?



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1 Klein

2 A. Yeah.

3 Q. You don't see anything here in
4 Birdsall's report indicating that he
5 discovered something that was possibly human
6 blood in the van, do you?

7 A. No.

8 Q. And if the serologist who was the
9 person that examined the van found nothing
10 that was possibly human blood in the van,
11 would it be proper to put in an application
12 to a judge for the extension of a search
13 warrant on March 29th, that something that
14 was possibly human blood was found in the
15 van?

16 MR. SEPE: Objection to form.

17 THE WITNESS: Unless somebody else
18 saw it. You know, I agree with you.

19 If there's no information that
20 there's possibly human blood in a van,
21 and someone puts that in an affidavit,
22 then I don't know where they got that
23 from.

24 MR. SCHECK:

25 Q. Well, the point of having a



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2 serologist go through the van looking for
3 blood and semen is that person is equipped to
4 do presumptive tests for the presence of
5 semen and blood, right?

6 A. True.

7 Q. And no matter what anybody might
8 have believed what they saw who was a
9 detective in the van, the lead detective in a
10 homicide case would have to be limited to
11 what the serologist said about the presence
12 or absence of blood and semen; fair enough?

13 MR. SEPE: Objection.

14 MR. FREEMAN: I have to object.

15 You're assuming a fact not in
16 evidence or not before us at the EBT.

17 Mr. Klein said he thought he
18 remembered that Birdsall was a
19 serologist, but we don't know if he was a
20 serologist at that time, if he was acting
21 as a serologist when he made that report.

22 MS. CORNWALL: It is in the record
23 of the case for that date.

24 MR. SCHECK:

25 Q. Let's just assume for these



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1 Klein
2 questions about what would have been the
3 custom and practice in 1986.

4 MR. SEPE: I'm sorry, the DA's
5 Office or the Police Department?

6 MR. SCHECK: Both.

7 MR. SCHECK:

8 Q. The purpose of having a serologist
9 look through a van is that serologist would
10 do presumptive tests to determine the
11 possible presence or absence of blood and
12 semen, right?

13 A. That or removing scrapings from the
14 van and doing testing later on.

15 Q. Or removing hairs?

16 A. Hairs or possible blood.

17 Q. Is a lead detective in a homicide
18 case, based on your understanding in 1986, if
19 the serologist went through the van and found
20 nothing that could be characterized as
21 possible human blood, then it would be
22 improper to tell a judge in an affidavit
23 three days later that possible human blood
24 was found in the van?

25 MR. SEPE: Objection to form.



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1 Klein

2 THE WITNESS: If that's the only
3 information that --

4 Am I supposed to answer this?

5 MR. SEPE: If you can, yes.

6 THE WITNESS: If that's the only
7 information that a homicide detective
8 has, that a serologist has looked at the
9 van and can't find anything that might be
10 blood, and then on his own, the detective
11 goes in and says there's possible human
12 blood in the van, then I don't think that
13 would be proper. There should be some
14 support for what the detective is telling
15 the Judge.

16 MR. SCHECK:

17 Q. Now, at any time during the course
18 of this litigation, has anybody from the
19 County's Office asked your assistance in
20 trying to reconstruct what was the
21 prosecutor's file in either 1986 or 2005?

22 A. No.

23 Q. Have you gone through any documents
24 in trying to determine what was or was not in
25 the prosecutor's file in 1986 or 2005?



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1 Klein

2 A. That's a good question. I think
3 before we did the retrial, there were some
4 things I looked at to see, because the file
5 was in a different format than when I had the
6 case, to see if certain things were missing
7 or if we had this then.

8 I vaguely remember working with
9 Biancavilla maybe an hour or two hours
10 looking for certain documents. That was the
11 extent of it.

12 It was the preparation for the second
13 retrial, and he needed some explanations,
14 where did this come from, where did that come
15 from, that sort of thing.

16 Q. Do you remember that Theresa Fusco
17 disappeared, I guess, it was on November 10th
18 of 1984, after she left Hot Skates?

19 A. I'm sure her parents will never
20 forget the date, but I can't remember the
21 exact date.

22 Q. But do you remember there was a
23 number of weeks that elapsed between the time
24 that she disappeared and the time that her
25 body was found?



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1 Klein

2 A. I would say that's fair.

3 Q. And during that period of time, do
4 you recall, from your efforts to find out
5 what happened before you were assigned to the
6 case, that there were many people interviewed
7 in this case?

8 A. Yes.

9 Q. Let me show you what's been marked
10 as Exhibit 185. I think you indicated you
11 knew who Mr. Spillane was?

12 MS. HOFFMAN: It's actually 184
13 and 185. 184 is the original letter,
14 which is barely legible.

15 MR. SCHECK: 185 is a typed
16 version.

17 MR. SCHECK:

18 Q. I'm going to direct your attention
19 to 185.

20 A. Can you tell me who prepared the
21 letter of this more legible one?

22 Q. I believe --

23 MS. HOFFMAN: Our office.

24 MR. SCHECK:

25 Q. Our office took a look at 184.



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1 Klein

2 A. Why don't we work off 184 because I
3 can read it, and if there's some dispute,
4 then I'll look at this, but I can read 184
5 pretty well.

6 Q. I call your attention to paragraph
7 two in 184.

8 A. Okay.

9 Q. I think it's the third sentence.
10 It says, "During the course of the initial
11 investigation --

12 A. Hold on, okay, yeah, "During the
13 course."

14 Q. "During the course of the initial
15 investigation at the Command Post,
16 approximately 500 persons were interviewed."

17 Okay?

18 A. Yes.

19 Q. Do you see that?

20 A. Yes.

21 Q. You recall, do you not, that quite
22 a number of people were interviewed at the
23 beginning of this investigation?

24 A. Yes.

25 Q. And then there came a point in time



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1 Klein

2 when suspicion focussed on Dennis Halstead,
3 correct?

4 A. At some point, yes.

5 Q. Now, do you have any specific
6 recollection of being given all of these
7 interviews of 500 people that were done in
8 this case, especially those that did not
9 relate to the investigation of Restivo, Kogut
10 and Halstead?

11 A. I have a general recollection of
12 looking through the police investigation in
13 total, whether it related to Halstead,
14 Restivo or not. As to specific documents, I
15 couldn't possibly recall that now.

16 Q. Right.

17 A. I do remember, that's the way I
18 would start to look at a case.

19 Q. But when you said that you would
20 look, that would be that you would go and
21 look at the homicide file?

22 A. Either that or they would bring it
23 to my office. Generally, they would bring it
24 to my office, but it could work both ways.

25 Q. But in terms of getting the actual



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1 Klein
2 documents and making them part of the
3 District Attorney's file, that was a
4 different process?

5 A. If it was made a part of the
6 District Attorney's file. That's not
7 necessarily the case that we would just copy
8 everything that homicide had and make it part
9 of our file.

10 Q. So that wasn't the general
11 practice, right?

12 A. To just copy the whole, no, that
13 was not the general practice.

14 Q. So it was the general practice that
15 you would take those documents from the
16 homicide file that you thought were relevant
17 to the case?

18 A. Yeah, giving relevance a broad
19 reading.

20 Q. And when either you went and looked
21 at the police file or it was brought to you,
22 you were relying on the homicide detectives
23 to present you with their files?

24 A. Yes.

25 Q. I'm showing you Exhibit 168.



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1 Klein

2 Do you remember at any time reviewing a
3 poster of the description of Theresa Fusco
4 when she went missing?

5 A. I remember reviewing at least one
6 poster.

7 Q. Would this be --

8 A. I couldn't say that this is the
9 exact one. It could very well be, but it may
10 be different too.

11 Q. Would it be fair to say that, to
12 the best of your recollection, the
13 description of Theresa Fusco that was put on
14 the missing poster was height, 5'3"; weight,
15 104 pounds; age, 15; brown hair; blue eyes;
16 striped blue jeans; white balloon sneakers.

17 Do you see that?

18 A. I see it.

19 Q. Consistent with your recollection?

20 MR. SEPE: His recollection of
21 what?

22 MR. SCHECK:

23 Q. Of what the victim was wearing when
24 she went missing, to the best of your
25 knowledge.



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1 Klein

2 A. The only thing that's new the way
3 I'm looking at this now that I don't
4 recollect is striped blue jeans. The rest of
5 it I remember.

6 I can't say that that was exactly her
7 weight and her height, but it's consistent
8 with the way I viewed her. She did have
9 brown hair. She did have blue eyes.

10 I remember a denim jacket. I remember
11 that description of balloon sneakers because
12 I never heard that before. Striped blue
13 jeans, I can't say that I recall it now,
14 but --

15 Q. Striped blue jeans are a somewhat
16 distinctive description of blue jeans, right?

17 A. Well, compared to solid blue jeans,
18 yeah.

19 Q. Do you have a specific recollection
20 of getting information that soon after
21 Theresa Fusco's body was found there was a
22 witness who had reported being at the
23 intersection near where her body was
24 recovered and hearing a woman scream at or
25 around the time that Fusco disappeared?



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1 Klein

2 A. I can't recall that specifically,
3 those facts, no.

4 Q. Do you have a specific recollection
5 of ever hearing that there was a witness that
6 said that in the area where Theresa Fusco's
7 body was found, she saw a beige car with a
8 broken windshield and blankets and a rope
9 inside that car?

10 A. I think you told me that.

11 Q. I told you that?

12 A. Yes.

13 Q. But prior to my telling you that,
14 you had no specific recollection of any
15 homicide detectives ever discussing that with
16 you?

17 A. I can't say that never happened,
18 but I don't remember it happening.

19 Q. I'm only asking what you remember.

20 (Discussion held off the record.)

21 Just to be clear, I don't remember,
22 maybe you do, the specific date when I
23 discussed this with you.

24 A. I can't give you a specific date.
25 I can give you an approximate time.



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1 Klein

2 Q. Yes, no problem.

3 A. I was still working at the Attorney
4 General's Office at the time, and you called
5 me there. I was sitting at an outside
6 cubicle, which means it was towards the end
7 of my time there, so I'm going to say it was
8 sometime in 2006, and I remember the
9 conversation somewhat.

10 Q. What do you remember my saying?

11 A. I remember something like you
12 saying that you had found this information,
13 something about a car, something about, I
14 don't remember much other than the car,
15 whether I had any recollection of that from
16 the case, and I think I told you I did not.

17 Q. Right.

18 You mean 2009 we had this conversation,
19 don't you?

20 A. No, you're right, I'm sorry. I'm
21 thinking of the DA's Office. Yes, 2009, like
22 the spring, maybe of 2009.

23 Q. And --

24 A. I think I told you that I thought
25 the County Attorney's Office was representing



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1 Klein

2 me then.

3 Q. Right.

4 A. I think I suggested that you speak
5 to them.

6 Q. Right.

7 And have you reviewed any documents about
8 this issue of a beige or tan car being seen
9 in the area where Theresa Fusco was
10 eventually found at or around the time she
11 disappeared.

12 A. I don't think so.

13 MR. SCHECK: Before we review these
14 documents, maybe this is an appropriate
15 time to break.

16 It's now 1:17 by my watch, so is,
17 45 minutes appropriate so we can
18 reconvene at two?

19 (Luncheon recess taken at 1:18 p.m.)
20
21
22
23
24
25



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1 Klein

2 A F T E R N O O N S E S S I O N

3 (Time noted: 2:08 p.m.)

4 F R E D K L E I N, resumed and
5 testified as follows:

6 EXAMINATION BY (Cont'd.)

7 MR. SCHECK:

8 Q. Mr. Klein, wouldn't you agree, as a
9 general matter, that sometimes in your
10 experience as a district attorney, as a
11 lawyer, a witness comes forward to describe
12 something that happened some period ago in
13 the past, and the witness is wrong about
14 dates but right about the sequence of event;
15 has is that occurred to you?

16 A. I can't recall a specific instance.
17 I'm not saying it never occurred, but I can't
18 recall one.

19 Q. Well, i guess, what I'm saying is,
20 as a trial lawyer, would you not agree that
21 when evaluating the testimony of a witness
22 who comes forward and says I remember
23 something that happened a month ago on X
24 date, right, that even if the witness gets
25 the date wrong, what's important is to look



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1 Klein

2 at the sequence of events the witness
3 describes and any corroboration that may
4 arise as to what the witness said?

5 MR. SEPE: Objection to form.

6 THE WITNESS: I can see that
7 happening. The relative importance of it
8 depends upon each witness, but I can
9 certainly see that happening.

10 MR. SCHECK:

11 Q. Right.

12 So would it have been your practice back
13 in 1986 to examine the sequence of events
14 that a witness described and to look at
15 objective physical evidence that might
16 corroborate it?

17 A. That would be one of the things I
18 would do.

19 Q. Sure, right?

20 A. Yes.

21 Q. I would like to start by showing
22 you, I guess, it's 166.

23 Looking at 166, do you see that this is a
24 report by a John French that his car was
25 stolen on November 10th, 1984, sometime



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1 Klein
2 between 2130 and 2305 hours, right?

3 A. Yes.

4 Q. And putting it in English, what is
5 2130 hours?

6 A. That would be 9:30 p.m.

7 Q. This document indicates French is
8 reporting that sometime between 9:30 and
9 11:05, on November 10th, 1984, his car was
10 stolen, right?

11 A. That's what it says.

12 Q. And the location is the south side
13 of Lakeview Avenue, 200 feet west of Ocean
14 Avenue in Lynbrook, New York.

15 Do you see that?

16 A. Yes.

17 Q. I would like to have you turn and
18 look at this chart that we've created.

19 Could you look at the bottom and tell me
20 what exhibit it is?

21 A. 170 A.

22 Q. And I represent to you that
23 witnesses have said that, this is not drawn
24 to scale, but it is a fair and accurate
25 depiction of the area where Theresa Fusco's



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1 Klein

2 body was found in 1984, the general area.

3 A. Yes.

4 Q. Can you take a look at the point
5 that's labelled Number Three, "John French
6 reported car stolen from this location on
7 November 10th, 1984."

8 Do you see that?

9 A. Yes, I do.

10 Q. And based on your knowledge of the
11 geography, would you agree that's somewhere
12 in the area of the south side of Lakeview
13 Avenue, 200 feet west of Ocean Avenue?

14 A. This is south pointing down?

15 Q. Yes.

16 A. So that would be south of Lakeview
17 Avenue but east of Ocean Avenue.

18 Q. General area, okay.

19 A. So that's wrong.

20 Q. So you would say Number Three
21 should be to the left of Ocean Avenue because
22 that would be the left side?

23 A. If this statement is accurate. The
24 statement might be inaccurate.

25 Q. You see that the car that he



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1 Klein

2 reports stolen is a Delta 88, I'm looking at
3 the diagram, and the color, I think that
4 would be gold, but we'll go back into it,
5 black top.

6 You see that, right?

7 A. Yes, 1971?

8 Q. Yes.

9 A. With a hunting knife above the
10 passenger door?

11 Q. Looking at page two of this
12 exhibit, you can see that there's a report
13 here concerning this vehicle, which indicates
14 that "license plates belonging to the owner
15 were put on a car owned by Debra Ann
16 DeCarlo," right?

17 A. I'm not following along.

18 Does this have something to do with the
19 previous document?

20 Q. Yes. In other words when you look
21 at the document --

22 A. "License plates belonging to
23 owner."

24 Does that mean Mr. French?

25 Q. Yes.



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1 Klein

2 A. "Were put on a car owned by Debra
3 DeCarlo. Her plates were found on the stolen
4 vehicle."

5 I'm not following this. It sounds like
6 French's plates were put on her vehicle, but
7 her plates were found on the stolen vehicle?

8 Q. Yes. Just take a look at "Location
9 of recovery."

10 "Woodfield Road, south of Eagle Avenue,"
11 right?

12 A. Woodfield Road, that's recovery of
13 the car, the plates?

14 Q. The French car.

15 Do you see that on this report?

16 A. "Location of recovery, Delta 88
17 Oldsmobile," right.

18 Q. So this report, would you agree,
19 indicates that on the French car, when it was
20 recovered on Woodfield Road, south of Eagle
21 Avenue, it had the plates that belong to,
22 apparently, Debra Ann DeCarlo's car?

23 A. That's where I'm confused.

24 MR. SEPE: Objection to form.

25 THE WITNESS: Her plates were found



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1 Klein
2 on the stolen vehicle.

3 MR. SCHECK:

4 Q. Yes.

5 A. Her plates?

6 Q. Yes.

7 A. Not Mr. French's plates.

8 Q. That's right.

9 A. But then it says, "Plates belonging
10 to owner," that's not referring to
11 Mr. French, the owner, "were put on a car
12 owned by Debra Ann DeCarlo." So I'm
13 confused.

14 Q. Looks like a switch.

15 A. No, I'm confused. It sounds like
16 two sets of plates were put on the same car.

17 Q. Her plates were put on French's car
18 and French's plates were put on her car.

19 Do you see that?

20 A. Her plates were found, okay.

21 Q. Okay?

22 A. Yes.

23 Q. Just taking a look at that location
24 that's described as the place of recovery,
25 Woodfield Road, south of Eagle Avenue, right,



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1 Klein
2 could you look up at Number Six?

3 A. Right here, yes.

4 Q. Do you see that, based on your
5 knowledge of geography, is that Number Six
6 roughly in the area of Woodfield Road, south
7 of Eagle Avenue in West Hempstead?

8 A. Yes.

9 Q. And note, please, also, on this
10 police report, that the date and time of
11 recovery is November 18th, 1984, at 4:45 p.m.

12 Do you see that?

13 A. Is that at the top?

14 Q. No, that's date and time of
15 recovery.

16 Do you see that

17 A. Yes.

18 Q. Let me show you Exhibit 162.

19 You see that this indicates it's a
20 handwritten report prepared on December 11th,
21 1984, by a Detective Mitchell.

22 Do you know a Detective Mitchell?

23 A. I did.

24 Q. Who is he?

25 A. I saw his name on another document.



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1 Klein

2 That's what refreshed my recollection,
3 otherwise I wouldn't remember. I remember
4 Joel Mitchell from wherever this occurred,
5 this Fifth Precinct or Fourth Precinct down
6 on the south shore.

7 Q. But you remember Detective Mitchell
8 being associated with the investigation of
9 this matter?

10 A. Apparently. I don't know that I
11 ever dealt with him personally.

12 Q. So I'm reading from Deposition
13 Exhibit 162.

14 It says, "Lost from John French's auto;
15 rope, tools under the front seat wrapped in
16 plastic carrying case, cassette tape,
17 insurance cards, coins, bills and floor
18 mats."

19 And then there's a line, correct, do you
20 see that?

21 A. Yes.

22 Q. Then it says, "Nothing was on the
23 back seat of the auto prior to the theft of
24 the vehicle.

25 Do you see that?



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1 Klein

2 A. Yes.

3 Q. And another line.

4 "Radio was taken from dashboard, Sanyo
5 AM/FM cassette stereo, two speakers from rear
6 of car."

7 And then there's a line, and then please
8 pay careful attention to this.

9 "Windshield was not," and "not" is
10 underlined, "broken prior to the theft."

11 Do you see that?

12 A. Yes.

13 Q. Then there's an indication that at
14 the time of the theft, French was visiting
15 Mike Becht at One Ocean Avenue, Malverne.

16 Do you see that?

17 A. Yes.

18 Q. Now, do you have a specific
19 recollection of ever seeing this document
20 before?

21 A. I don't know whether I've seen this
22 document before or not.

23 Q. So the answer to that question
24 would be no?

25 MR. SEPE: His answer is he doesn't



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2 recall seeing it.

3 MR. SCHECK:

4 Q. My question is do you have a
5 specific recollection of seeing this document
6 before?

7 MR. SEPE: And he's answered that.

8 Do you want to answer it again?

9 THE WITNESS: I don't know whether
10 I've ever seen this document before or
11 not.

12 MR. SCHECK:

13 Q. But this doesn't refresh your
14 recollection, oh, yes, I remember seeing this
15 document, or, put it another way, after
16 having reviewed this document, it doesn't
17 trigger in your mind that at some point you
18 were provided this specific information about
19 John French's car?

20 A. I could have been or not. I don't
21 remember.

22 Q. So as we sit here today, you have
23 no specific recollection of knowing the
24 information that's in Defendants'
25 Exhibit 162?



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2 MR. SEPE: That's asked and
3 answered.

4 MR. SCHECK:

5 Q. This is about the information, not
6 the document.

7 THE WITNESS: Do I answer it?

8 MR. SEPE: Yes.

9 THE WITNESS: I don't know whether
10 I got this or not.

11 MR. SCHECK:

12 Q. I'm not talking about the document.

13 A. The information, yeah, I don't know
14 whether I had the information or not.

15 Q. I'm going to ask you the same
16 question about the documents of the theft of
17 John French's auto.

18 Do you have a specific recollection of
19 ever having seen these documents before?

20 MR. SEPE: I'm sorry, just for
21 clarity, which exhibit are you talking
22 about?

23 MR. SCHECK: 166.

24 THE WITNESS: No, I don't know
25 whether I've seen this before or not.



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2 MR. SCHECK:

3 Q. Let me call your attention to
4 Exhibit 158.

5 Do you recognize this to be a Homicide
6 Lead Sheet?

7 A. Yes.

8 Q. And this is about a lead that was
9 received on December 9th, 1984, at about
10 4:25.

11 Do you see that?

12 A. I do.

13 Q. And it was received by Detective
14 Volpe, right?

15 A. Appears so.

16 Q. And he was the lead investigator
17 here, right?

18 A. He was.

19 Q. And the name of the lead source is
20 Debbie Smith, correct?

21 A. Correct.

22 Q. It says, "Called and stated that
23 between 11/17 and 11/20, she was driving over
24 Sunrise at Rocklyn between 2100 and 0."

25 So I guess that would mean between 9 p.m.



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2 and midnight, yes?

3 A. Yes.

4 Q. "And heard a scream. When she got
5 to the railroad tracks on Rocklyn, there was
6 a car parked with no one in it. Auto
7 possibly tan, four-door, older vehicle, large
8 windows. Had tools and dark colored blanket
9 in auto."

10 Do you see that?

11 A. Yes.

12 Q. I'm going to show you what's
13 Defendants' Exhibit 160, okay?

14 A. You don't want me to --

15 Q. I'm going to go back to that.

16 A. Hold on one second.

17 Q. And Document 160, you see that it
18 is a report here from Detective Mitchell,
19 yes, handwritten?

20 A. It's got his name on it. I don't
21 know who wrote it.

22 Q. On 12/11/84 at 10:30.

23 Do you see that?

24 A. Yes.

25 Q. And it indicates here, "Debbie



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2 Smith called command bus."

3 A. Yes.

4 Q. What is a command bus, by the way?

5 A. They have like a mobile van, at
6 least they did when I was there, which is
7 kind of like a, what do you call those
8 things, a big camper, or a bus, more like a
9 bus. It will have desks in it and whatnot,
10 and at some scenes they'll actually place
11 that at a scene, kind of like a police
12 presence, and one of the purposes was to have
13 people see it; and if they had information at
14 that location, they would come and give it.
15 So they called it a "bus."

16 Q. So Defendants' 160 indicates,
17 "Debbie Smith called command bus and states
18 she is not sure she saw the automobile
19 between 11/17 and 11/21 or between 11/10 and
20 11/14. She will attempt to put her dates and
21 activities in order and call us back."

22 Do you see that?

23 A. I do.

24 Q. Referring back now to Defendants'
25 158 for a second, that's the original lead



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2 sheet on Debbie Smith, you see that on
3 December 9th, she stated that she was driving
4 over at Sunrise and Rocklyn.

5 A. Where are you reading from?

6 Q. The very top.

7 A. Okay, the same thing.

8 Q. Right. Review that.

9 And this was between 11/17 and 11/20 is
10 what she recalled originally on 12/9,
11 correct?

12 A. 12/9.

13 Q. And you see two days later, right,
14 she's calling back and saying she's not sure
15 whether the dates were November 17th and
16 November 21st or it was between November 10th
17 and November 14th.

18 Do you see that?

19 A. I see what the paper says.

20 Q. November 10th, sometime after
21 between 9:00 p.m. and 1:00 p.m., which I
22 think we reviewed was the time John French
23 estimated that his car was stolen, reported
24 missing, do you remember that?

25 A. 9:35 and 11:05?



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2 Q. Yes.

3 Now, 9:35 to 11:05, during that period,
4 it's during that period that Theresa Fusco
5 was last seen alive at Hot Skates, right?

6 A. It's in the range. Obviously, I
7 don't know the exact time she clocked out,
8 but it's somewhere, it's in the evening. She
9 worked the night shift that night.

10 Q. Just look at our diagram there,
11 which is Deposition Exhibit 170 A, and could
12 you look there and see the location of Hot
13 Skates?

14 I think that's Number One.

15 A. Right.

16 Q. Do you recall if that's a fair and
17 accurate representation of where Hot Skates
18 was?

19 A. I can't be that specific. It seems
20 about right. I know Rocklyn Avenue was there
21 and the railroad tracks were there.

22 Q. You see Number Two, which is on
23 this exhibit labelled "The location of
24 Theresa Fusco's body as it was found on
25 December 5th, 1984, general area"?



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A. That's right.

Q. Does that strike you as the general area where her body was found?

A. Yes.

Q. Let's look at Number Five, and you see that's Theresa Fusco's home, is that correct, do you see that?

A. Right, Windsor Place.

Q. At one point during the investigation of the case, there was some thought, was there not, among investigators, and I take it prosecutors, that Theresa Fusco had left Hot Skates and was walking home when she was abducted; is that right?

A. I don't remember that.

Q. You don't remember that?

A. No.

Q. Does it make some sense to you that Number One, that's where Hot Skates is, and Number Five, that's where her home is, correct?

MR. SEPE: Objection to form.

THE WITNESS: That's what the map indicates. I have no reason to believe

1 Klein

2 it's not accurate.

3 MR. SCHECK:

4 Q. Assuming all this is accurate, does
5 it not follow that given where her body is
6 found, Theresa Fusco's body is found, right,
7 that if she had, in fact, left Hot Skates and
8 was walking home, it was somewhere in that
9 area that she could have been abducted, raped
10 and murdered?

11 A. I can't answer that. I don't know
12 that she was walking home.

13 Q. I'm asking if, in fact, she left
14 Hot Skates and was on her way home --

15 A. Right.

16 Q. Assuming that is an investigative
17 theory, do you have that in mind?

18 A. If you say so. I mean, this is the
19 first I've heard of it.

20 Q. It had never occurred to you that
21 Theresa Fusco might have been walking, after
22 she left Hot Skates, home when she was
23 abducted?

24 A. My understanding was from the time
25 I got involved in the case was that she was



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2 walking westbound on Merrick Road, I believe,
3 and that's where Kogut admitted picking her
4 up in Restivo's van.

5 Q. That's what the Kogut confession
6 said, right?

7 A. Right, and I don't remember hearing
8 a different version back then.

9 Q. Just looking at the diagram,
10 right --

11 A. Right.

12 Q. -- would it not have been a
13 reasonable investigative lead before, before
14 there was any confession by John Kogut, that
15 Theresa Fusco could have been abducted after
16 leaving Hot Skates, labelled Number One, and
17 on her way home, which is labelled Number
18 Five on that exhibit?

19 A. Anything's possible.

20 Q. Well, it's not just a question of
21 possible, is it; isn't that a reasonable
22 investigative theory, given the fact that, as
23 you know, she was leaving Hot Skates that
24 evening and her home is in that area that's
25 labelled Number Five; and her body is found



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2 in an area between Hot Skates and her home,
3 right?

4 MR. SEPE: Objection to form.

5 THE WITNESS: From what you're
6 telling me, it's not enough evidence to
7 be an investigative lead.

8 MR. SCHECK:

9 Q. I'm only asking --

10 A. It's a possibility. Could she have
11 gone home after she left work, it's possible.

12 Q. I'm only asking you --

13 A. She could have gone to a friend's
14 house, she could have gone to a burger place,
15 she could have gotten a ride with Halstead
16 and Restivo. I don't know.

17 MR. SCHECK:

18 Q. All those things are possible, but
19 isn't it one reasonable hypothesis that you
20 would expect an investigator to be pursuing,
21 right, sometime after December 5th after the
22 body of Theresa Fusco was discovered at the
23 location that's Number Two here, that she
24 might well have left Hot Skates and been
25 walking home when she was abducted?



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2 MR. SEPE: Objection to the form of
3 the question as it not only calls for
4 speculation, but asks for speculation as
5 to someone else's state of mind.

6 You can answer it.

7 THE WITNESS: I can't answer it.

8 MR. SCHECK:

9 Q. You can't answer whether that would
10 be a reasonable hypothesis for an
11 investigator that after she left Hot Skates
12 at 9:30, given where her body was recovered,
13 that she might have been abducted on her way
14 home?

15 A. I say it's a possibility. That's
16 the way I would phrase it.

17 Q. A possibility, and I'm asking you
18 this.

19 Would it have been, in your judgment as
20 to the customs and practices of people in
21 1986 in the DA's Office and the Police
22 Department, would that not have been a
23 reasonable investigative possibility to
24 pursue?

25 A. Could have been.

1 Klein

2 Q. Let's go back to Exhibit 158, and
3 you see this lead sheet from the report of
4 Debbie Smith by Volpe which states, "Called
5 and stated that between 11/17 and 11/20, she
6 was driving over Sunrise at Rocklyn --

7 A. Can I just get my bearing?

8 Q. Yes.

9 A. Okay.

10 Q. Now, you see where she was saying
11 she was driving over, that is, Debbie Smith
12 driving over Sunrise and Rocklyn; you see
13 that, right?

14 A. I do.

15 Represented by Number Four, Rocklyn
16 Avenue and Sunrise Highway, the intersection?

17 Q. If you notice, Number Four says,
18 "Debbie Smith's location when she reported
19 seeing a car and hearing a scream."

20 Do you see that?

21 A. I see that. It says here, "She was
22 driving over Sunrise at Rocklyn."

23 I assume she's talking about the
24 intersection of Sunrise Highway and Rocklyn
25 Avenue.



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2 Q. And this lead sheet says, just
3 we're clear for the record, "She was driving
4 over Sunrise at Rocklyn and heard a scream.
5 When she got to the railroad tracks on
6 Rocklyn, there was a car parked with no one
7 in it, auto possibly tan, four-door, older
8 vehicle, large window. Had tools and dark
9 colored blanket in auto."

10 Do you see that?

11 A. I do.

12 Q. Take a look at Number Four, and
13 would you not agree that Location Number Four
14 is consistent with where Debbie Smith says
15 she was when she heard a scream?

16 A. You know, it doesn't say which
17 direction she was going on Sunrise, but
18 assuming she's going, she's driving over
19 Sunrise to Rocklyn.

20 Q. At Rocklyn.

21 A. She was driving over Sunrise at
22 Rocklyn. Okay, she's on Rocklyn.

23 Assuming she's saying she's going kind of
24 northeast, I would say that's consistent. It
25 doesn't say which direction she's going.



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2 Q. It says, "When she got to the
3 railroad tracks on Rocklyn."

4 A. That's why I'm saying, if she's
5 going this way, I would agree that that's
6 consistent. She's going northeast.

7 Q. Let the record reflect that you're
8 indicating northeast, right?

9 A. If that's the direction she was
10 going, that would be consistent with what she
11 says.

12 Q. Assuming this diagram is drawn
13 consistent with Defendants' 158, at least
14 your description that she was going northeast
15 on Rocklyn Avenue, right?

16 A. Yes.

17 Q. At around the areas of the railroad
18 track, she's reporting that she saw a tan
19 auto parked there, correct?

20 A. It doesn't say where the car was.

21 Q. Maybe let's turn to the second
22 page. Maybe this will help you a little bit.
23 The second page has at the top of it, these
24 are handwritten notes.

25 It says, "Detective Volpe," correct?



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A. Yes.

Q. And it has in quotation marks,
"28 years."

Do you see that?

A. Yes.

Q. It says, "422"?

A. "0422."

Q. "0422," and this handwritten
report says, "Debbie Smith reports a few
weeks ago she was at the Sunrise/Rocklyn
northbound. She heard a girl scream. When
the light changed, she observed a vehicle
parked on the east side of Rocklyn Avenue at
Long Island Rail Road overpass. No
occupants. Vehicle description, 1970 to '75
gray or beige with large windows in it. Time
approximately 2100 to 0100 hours."

Do you see that?

A. Yes.

Q. Now, putting this second page
together, would you not agree that Number
Four is a location on this diagram that's
consistent with these police reports of where
Debbie Smith said she was heading northeast



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2 on Rocklyn when she heard a scream and then
3 by the railroad tracks observed a vehicle
4 parked on the east side of Rocklyn at the
5 Long Island Rail Road overpass?

6 MR. SEPE: Objection to form.

7 THE WITNESS: Technically, I would
8 put the Four in a little different
9 location, but it's in the general
10 vicinity. If Four represents where the
11 car was as opposed to where she was, she
12 says it's on the east side of Rocklyn
13 under the railroad, under the overpass, I
14 would put it more on the other side.

15 I don't know if it's where she sees
16 the car or where the car was when she
17 first sees it.

18 MR. SCHECK:

19 Q. It says, "Location where she
20 reported seeing the car and hearing a
21 scream."

22 A. So is it where the car is or where
23 she is?

24 Q. If you look at this description,
25 she reports that she heard a scream, right?



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A. Yes.

Q. And then when the light changed and she was heading towards the railroad tracks, she observed a car.

Do you have that in mind?

A. Absolutely.

Q. So, Number Four, you would agree, is in the area where she describes hearing the scream and then seeing the car across the street where she eventually heads in the northeast direction; fair enough?

A. You could read it that way.

Q. If Theresa Fusco had been abducted around the time that Debbie Smith says that she was in the intersection, further assuming that this was on the evening of November 10th, a scream could have occurred from the area where her body was eventually found, right, based on her report?

A. If you're asking me if she's at Number Four, could she have heard a scream from Number Two?

Q. Yes, in that area.

A. I don't know. It seems close



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2 enough on the map.

3 I don't know what's separating these
4 railroad tracks. My recollection is that
5 they were high, and I don't know if someone
6 could hear what was going on, on the other
7 side, on Sunrise Highway.

8 It's a major intersection. I believe
9 this was a Saturday night.

10 I don't know. I'm guessing, but there's
11 a lot of variables in there, but looking at
12 it from here, it's not inconceivable.

13 Q. I'm going to be taking you through
14 these documents with the objective in mind of
15 asking you whether or not, in 1986, after
16 December 5th, this was December 9th, after
17 the body was recovered and this report from
18 Debbie Smith was received, whether or not it
19 would be a reasonable investigative theory to
20 pursue that Debbie Smith had, in fact, heard
21 a scream from Theresa Fusco on November 10th,
22 at or around the time that she was last seen?

23 A. Okay.

24 Q. Do you have that in mind?

25 A. I do.



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Q. So, so far, would you not agree, based on what you've read, that it would have been a reasonable investigative lead to pursue that Debbie Smith had actually heard Theresa Fusco screaming and that the car involved could have been the car in which she was abducted?

MR. SEPE: Objection to form.

MR. SCHECK:

Q. Just a reasonable lead to pursue?

A. I think it depends.

Q. Based on what I've shown you so far?

A. It depends.

MR. SEPE: Mr. Scheck, just to clarify, when you say a reasonable investigative lead, are you asking whether it was from the DA's Office, the Police Department?

MR. SCHECK:

Q. I'm asking, based on your understanding of the customs and practices of the Police Department and the DA's Office, in 1986, would it not have been a reasonable



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2 investigative lead to pursue that Debbie
3 Smith might well have heard Theresa Fusco
4 scream and that the car that she observed
5 could have been used in the abduction of
6 Theresa Fusco?

7 A. And I'm saying it depends.

8 Q. So far, as far as you're concerned,
9 it depends, based on what you've seen?

10 A. Yes.

11 Q. And, I take it, based on the
12 documents that we've reviewed up until to
13 time, none of this rings a bell for you as
14 something that you have a specific
15 recollection of having discussed prior to the
16 trial with Detective Volpe?

17 MR. SEPE: Objection as to form.

18 THE WITNESS: Should I answer?

19 MR. SEPE: Yes.

20 THE WITNESS: It could very well
21 have been discussed or not. I don't
22 remember right now.

23 MR. SCHECK:

24 Q. I'm asking whether you remember it
25 now, as you sit here today?



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2 A. I'm saying I don't remember it now.

3 Q. So if you don't remember it now,
4 the answer to my question is no, you don't
5 remember this.

6 MR. SEPE: Hold on one second.

7 First of all, let him finish his answers
8 before new questions come. Second,
9 please, don't raise your voice to him.

10 MR. SCHECK:

11 Q. Let me just indicate to you how I'm
12 going to ask these questions, all right, and
13 please try to make your answers responsive to
14 my questions, okay?

15 A. That's exactly what I'm doing,
16 Mr. Scheck.

17 Q. Now, you keep on answering this
18 question, oh, it may have happened or may not
19 have happened. I can't tell you.

20 Correct?

21 MR. SEPE: We don't need the
22 colloquy or the comments either. Let's
23 keep it to questions and answers.

24
25 MR. SCHECK:



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2 Q. You've given that answer, haven't
3 you, a number of times?

4 A. Not in your tone of voice, but I've
5 tried to be as truthful as I can.

6 Q. I understand, but I just want you
7 to focus on my questions?

8 A. I'm trying.

9 Q. And my question is, yes or no, do
10 you have any specific recollection of
11 discussing with Detective Volpe prior to the
12 trial a witness named Debbie Smith and her
13 hearing a scream at the intersection of
14 Rocklyn near the Long Island Rail Road tracks
15 near where the body was discovered, do you
16 have a specific recollection of that as we
17 sit here today, yes or no?

18 A. I can't answer that yes or no.

19 Q. Well, I think you certainly can,
20 sir.

21 MR. SEPE: Well, he disagrees, and
22 if he says --

23 MR. SCHECK: No, no, no.

24 MR. SEPE: Respectfully, I'm making
25 a record here, that he doesn't know, his



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2 answer is going to have to stand.

3 MR. SCHECK:

4 Q. I understand that you're saying I
5 don't know.

6 I'm asking you, as you sit here today, do
7 you have a specific recollection of having a
8 discussion with Detective Volpe about a
9 witness named Debbie Smith who heard a scream
10 at these railroad tracks.

11 As you sit here today, I'm asking you, do
12 you have that recollection?

13 A. I'm telling you I don't know. Now,
14 you can lean over towards me, you can ask it
15 another time, but I'm trying to give you as
16 fair an answer as I can.

17 MR. SEPE: Can I maybe just try to
18 help the situation a little bit?

19 In fairness to Mr. Scheck, do you
20 have a mental image in your mind of you
21 having a recollection of the scene, the
22 location, the place, the tone, details
23 about a specific conversation where they
24 came up?

25 Is that maybe getting closer to



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2 what you're looking for?

3 THE WITNESS: I can't remember.

4 MR. SCHECK:

5 Q. If you can't remember something,
6 then that means, as you sit here today, you
7 do not have a specific recollection of
8 discussing this Debbie Smith lead with
9 Detective Volpe, true?

10 MR. FREEMAN: Objection.

11 MR. SEPE: We're going to have to
12 stop on that point, I'm sorry.

13 MR. SCHECK:

14 Q. True?

15 MR. SEPE: We're going to have to
16 stop on that point. He's asked and
17 answered that several times.

18 I understand the point you're
19 trying to make, but we can't be telling
20 the witness that I don't remember isn't
21 good enough. I know what you're saying
22 in terms of a specific recollection
23 versus you just don't know if it
24 happened.

25 I get the distinction you're trying



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1 Klein

2 to make, which is trying to elucidate him
3 a little bit, but we have our answer.

4 MR. SCHECK:

5 Q. In trying to lower the tone here,
6 if you don't recollect something, Mr. Klein,
7 would you, as we sit here today, would you
8 agree that means that right now, you do not
9 have a specific recollection?

10 MR. FREEMAN: Objection.

11 THE WITNESS: If I don't recollect
12 something, I don't recollect it. That's
13 about as clear as I can be.

14 MR. SCHECK:

15 Q. Right, so if you don't recollect
16 it, that means you have no memory of
17 something, correct?

18 A. Today, no.

19 Q. Mr. Klein, isn't it true that when
20 you keep on saying, oh, it may have happened,
21 it may not have happened, I can't say, right,
22 when you have no specific recollection of the
23 incident, what you're trying to do in that
24 answer is give wiggle room for other people
25 to say something did happen?



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2 MR. SEPE: I'll object to that
3 question.

4 DI I direct you not to answer. You
5 don't have to answer that question.

6 MR. SCHECK: Why doesn't he have to
7 answer that question?

8 MR. SEPE: Well, one, it's
9 badgering; two, it's argumentative;
10 three, it's asked and answered six
11 different ways; four, it's basically
12 going beyond arguing with the witness and
13 accusing him of taking a role in this
14 case with a motive that would be subject
15 to judicial and legal sanction.

16 MR. SCHECK:

17 Q. I will not make a big deal about it
18 now, but I'd ask you, we'll resume this at
19 some other time, to try to think about that
20 distinction between, when I ask you if you
21 have no specific recollection and you can't
22 remember something, being able to answer the
23 question, no, I don't have any specific
24 recollection.

25 A. You're just changing the answer



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2 from the question you just asked yourself.
3 If I don't recall, I don't recall.

4 If you say specific recollection, I'm
5 telling you the answer. I don't remember. I
6 can't get any clearer.

7 Q. How about this?

8 Maybe this will help.

9 You don't have either a general
10 recollection or a specific recollection --

11 MR. FREEMAN: Objection.

12 MR. SCHECK:

13 Q. -- of having a conversation with
14 Detective Volpe prior to the Restivo, Kogut
15 and Halstead trials of a witness, Debbie
16 Smith, who was at an intersection and heard a
17 scream from the area where Theresa Fusco was
18 abducted?

19 MR. FREEMAN: Objection.

20 MR. SEPE: Objection as well.

21 THE WITNESS: Am I allowed to
22 answer?

23 MR. SEPE: You can answer it.

24 THE WITNESS: The best I can tell
25 you is I don't remember.



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2 MR. SCHECK:

3 Q. You don't remember, meaning you
4 don't have a general or specific
5 recollection; is that right?

6 MR. FREEMAN: Objection.

7 THE WITNESS: I just don't
8 remember.

9 MR. SCHECK:

10 Q. Just so we're clear about what you
11 remember and you don't remember, do you
12 remember ever knowing this information?

13 A. The first I have an actual
14 recollection, if you want to phrase it that
15 way, is when you asked me on the phone.

16 Q. So the first recollection you ever
17 heard of Debbie Smith, this witness, and what
18 she said happened at the intersection is when
19 you and I discussed it on the phone in 2009?

20 MR. SEPE: Objection to form.

21 THE WITNESS: That's my first
22 recollection.

23 MR. SCHECK:

24 Q. Good.

25 A. Good question.



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1 Klein

2 Q. Thank you, professor.

3 A. You're welcome, professor.

4 Q. I'm just trying. Now, let's go on
5 and look at 158 further. This indicates that
6 is on December 9th --

7 A. Is that this two-page document, the
8 lead sheet?

9 Q. The lead sheet.

10 A. Where are you reading from?

11 Q. I'm reading on "Results: Indicate
12 dates and members investigated."

13 A. First page, okay.

14 Q. So it indicates that "on
15 December 9th, Ms. Smith responding to
16 homicide to view auto stolen in Lynbrook,
17 November 9th, 1984," and it has IMP 396-84.

18 Do you know what IMP 396-84 is?

19 A. My opinion would be that's an
20 impound number.

21 Q. Would it be fair to say that it
22 appears from this lead sheet, as the report
23 of the investigation, that after Debbie Smith
24 called at 4:25 in the afternoon on
25 December 9th, she was immediately asked to go



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2 down to homicide and view the vehicle found
3 in Lynbrook, the French car?

4 A. I would say that it indicates on
5 the day she called, she went down to homicide
6 and viewed that car.

7 Q. Would it be a fair inference that
8 she didn't just get there by herself, that
9 somebody from the police asked her to come
10 and look at the car?

11 A. I don't know how immediate it is.

12 Q. It's on the same date.

13 A. It is, but I don't know if it's
14 4:25 in the morning when she called or
15 4 o'clock in the afternoon. I don't know.

16 Q. Next it says, "Detectives Pierce
17 and Lane present at ESB."

18 What's that, ESB?

19 A. Emergency Services Bureau.

20 Q. "With above Debra. Viewed car.

21 After viewing, stated that she remembers the
22 broken windshield, the parking sticker in the
23 windshield, and the silver AAA sticker on the
24 rear bumper. Stated she would only give us a
25 90 percent because when she looked inside the



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2 car, there was a lot of garbage in the rear
3 seat. Remembers a blanket, thinks tools and
4 rope."

5 Okay?

6 A. Yes.

7 Q. "Said she viewed car between 11:00
8 at night to 1:00 a.m. because she remembers
9 no traffic on Sunrise Highway. There were no
10 trains on railroad overpass."

11 Do you see that?

12 A. Yes, I do.

13 Q. Looking back at the French
14 documents, as you recall, French reported his
15 car being stolen and indicated that the
16 windshield was not broken.

17 Do you remember that?

18 A. At the last time he saw it?

19 Q. Yes.

20 A. Yes.

21 Q. Now she's indicating that, Debbie
22 Smith, that she saw, that this is the car,
23 that this car has a broken windshield, and
24 that's what she remembers seeing in the tan
25 car by the Long Island Rail Road tracks at



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2 the time she heard this woman scream around
3 the intersection of Sunrise and Rocklyn?

4 MR. SEPE: Objection.

5 Just to be clear, and not to be
6 argumentive, but you're asking the
7 witness to agree with the
8 characterization of Volpe's notes as to
9 what Debbie said, right?

10 MR. SCHECK: That's correct.

11 THE WITNESS: She clearly says in
12 these notes that she remembers a broken
13 windshield. Apparently, in the car that
14 she looked at, there was a broken
15 windshield.

16 She's apparently unwilling to say
17 conclusively that this is the same car.

18 MR. SCHECK:

19 Q. She's saying, as we read this,
20 she's 90 percent sure that this is the car,
21 but the only difference is that the garbage
22 in the rear seat that she remembers, the
23 blanket and tools and rope are not in this
24 car, but they were in the car that she saw,
25 correct?



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2 A. That's what the notes say.

3 Q. Was there not a blanket recovered
4 from the scene where Theresa Fusco's body was
5 discovered?

6 A. I don't remember.

7 Q. You don't remember?

8 A. I remember, I don't remember she
9 was wrapped in a blanket, if that's what you
10 mean. Possibly in Restivo's van.

11 Yeah, I think there was a moving blanket
12 or something in the van. I'm just going back
13 in 25 years.

14 Q. You may be conflating the Kogut
15 confession about a blanket.

16 A. No.

17 Q. Versus what was found at the scene.

18 A. No, no, no. There may have been a
19 blanket in the van, or there may have been a
20 blanket on the ground in some location that
21 they picked up, but I don't remember a
22 blanket on the body.

23 Q. Well, not on the body.

24 A. I remember there was wood on top of
25 the body.



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2 Q. There was there a blanket in the
3 area of where the body was recovered.

4 A. I don't remember.

5 Q. You remember that Theresa Fusco was
6 killed, was murdered, and there was ligature
7 strangulation?

8 A. Yes.

9 Q. That would be consistent with being
10 strangled with a rope?

11 A. There was a dispute about that, but
12 it indicated it to me. A rope or some other
13 type, you know, a kerchief or a wire or
14 something like that.

15 Q. In terms of, I think what we were
16 discussing before as to whether or not this
17 Debbie Smith report would be a reasonable
18 investigative lead to pursue, soon after
19 Theresa Fusco's body was recovered, you
20 raised the question of what she could have
21 heard at or around the time, that is Debbie
22 Smith, at the intersection.

23 Remember that?

24 A. Yes.

25 Q. It says here she remembers no



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2 traffic on Sunrise Highway and there were no
3 trains on the railroad overpass.

4 Do you see that?

5 A. I see that.

6 Q. If there were no traffic and no
7 trains at or around the time she heard the
8 scream, there would have been a better chance
9 for her to have heard the scream; fair
10 enough?

11 A. Assuming there was a chance for her
12 to hear the scream.

13 Q. Right. We're only talking here
14 about what would have been a reasonable
15 investigative lead to pursue.

16 A. Right.

17 Q. And you raised the question as to
18 whether she could have heard anything?

19 A. Right.

20 Q. And now when you see in the
21 statement that there was no traffic and no
22 trains, that would make it a more reasonable
23 lead to pursue.

24 Wouldn't you agree?

25 MR. SEPE: Objection.



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2 A. Again, it would depend upon whether
3 it was reasonable for her to hear from where
4 she says she was to where they found her
5 body.

6 Q. But you said to us before though,
7 based on your knowledge of this area, you
8 concede now that it was certainly a
9 possibility that if there was no traffic and
10 no trains, that a person in the intersection
11 such as she describes it could hear a woman
12 scream?

13 A. What I said was from the distance
14 on the map, it's conceivable, and what I also
15 said was that I know the tracks are elevated
16 at that location, and I don't know that it's
17 conceivable, but it's literally a wall
18 between one side and another. Whether you
19 could hear what's going on, on the other
20 side, I don't know.

21 Q. Why don't we review Defendants'
22 159.

23 Now you see that Defendants' 159 is a
24 statement of Debra Smith taken on December
25 9th, 1984, right?



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2 A. Yeah.

3 Q. This is the same day that she
4 reported what she heard at the intersection
5 of Rocklyn and Sunrise Highway?

6 A. It's the same date that the lead
7 sheet's dated.

8 Q. Same day that the lead sheet
9 indicated she made a report, right?

10 A. Yes.

11 Q. Same day that the reports indicate
12 she was taken to view the French car,
13 correct?

14 A. Yes.

15 Q. And then a statement is taken,
16 correct?

17 A. Correct.

18 Q. Let's read the statement.

19 "Statement of Debra L. Smith. My name is
20 Debra L. Smith. I am 28 years old. I was
21 born," and it's blacked out.

22 "I live at," it's blacked out. "My home
23 phone number is," and it's blacked out.

24 "I work at American Technical Ceramics at
25 15 Stopper Place, Huntington Station, New



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2 York." Gives the phone number.

3 "As a computer program analyst. I live
4 at home with my parents and brother and
5 sister. I have been told by the detective
6 who is writing this statement that any false
7 reports I make herein are punishable as a
8 Class A misdemeanor pursuant to Section
9 210.45 of the Penal Law of the State of New
10 York. I wish to state last month, I believe
11 between November 17th and the 21st, I had
12 gone to my friend, James Pearson's home at,"
13 location blacked out, "for the evening. We
14 had an argument, and I left his house to go
15 home. I started driving on Atlantic Avenue
16 to Central Avenue. As I got to that corner,
17 I saw that the railroad gates were down for a
18 train that was going towards Long Beach. I
19 decided to take Rocklyn Avenue street up to
20 Merrick Road and Ocean Avenue."

21 A. I see Rocklyn Street.

22 Q. It says, "Rocklyn Avenue"?

23 A. I don't know that that's avenue. I
24 don't know what that is.

25 Q. There's an "Avenue" above "Street."



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2 A. It looks like someone's initials.

3 Q. That could be a correction of
4 street to avenue, correct?

5 A. I don't know what it is. I see
6 Rocklyn Street up to Merrick Road.

7 Q. You know these locations?

8 A. Only from that case.

9 Q. "And Ocean Avenue where I go to
10 Peninsula Boulevard and home. I drove north
11 on Rocklyn Avenue to Sunrise Highway. The
12 traffic light was red, and I stopped for the
13 light. I had my window partly open because I
14 was smoking. While I was sitting at the
15 light, I heard a woman scream. I rolled my
16 window down and listened but did not hear
17 anything else. The scream came from the left
18 and like it was up high. I looked at the
19 railroad elevated because that seemed to be
20 the direction that the scream came from."

21 Do you see that?

22 A. I do.

23 Q. Going back and looking at our
24 diagram here and where we have located Debbie
25 Smith reported seeing the car and hearing the



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2 scream, it would be consistent with the area
3 where Theresa Fusco's body was found, Number
4 Two, that she would have heard a scream to
5 her left, correct?

6 A. Yes.

7 Q. And this affidavit now explains
8 further that her window was rolled down
9 because she was smoking, right?

10 A. Well, it's not an affidavit. It's
11 apparently a statement.

12 Q. It's a sworn statement made under
13 penalties of --

14 A. The sworn part of it is, you know,
15 it's different. It's not really a sworn
16 statement where you can be charged with
17 perjury.

18 It's different. So I wouldn't call it an
19 affidavit.

20 Q. It's not an affidavit, but it's a
21 statement where the witness was being told if
22 she didn't tell the truth, she could be
23 prosecuted, right?

24 A. Absolutely.

25 Q. That's the kind of thing, in your



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2 experience, a witness would take more
3 seriously, not just an ordinary inquiry?

4 MR. SEPE: Objection to form.

5 THE WITNESS: Right, but it's not
6 an affidavit.

7 MR. SCHECK:

8 Q. This explanation about the window
9 being down, does that add something more to
10 the reasonable hypothesis that might be
11 investigated after the disappearance of
12 Theresa Fusco; in other words --

13 A. There's a reason why she might have
14 heard it.

15 MR. SEPE: Let him finish his
16 question.

17 MR. SCHECK:

18 Q. Is that right?

19 A. It's a reason why she might have
20 heard it.

21 Q. That adds something towards her
22 explanation being more plausible, does it
23 not, in terms of just a reasonable
24 investigative lead to be pursued; fair
25 enough?



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2 A. It's a statement indicating her
3 statement could be plausible.

4 Q. "The traffic light changed, and I
5 drove across Sunrise Highway and under the
6 railroad overpass. I saw a large, light to
7 medium tan car, four-door sedan, early
8 seventies. It had large windows. I looked
9 inside and saw a lot of stuff in the back
10 seat, and I think there were tools, a blanket
11 and other stuff in the back seat."

12 Do you see that?

13 A. I do.

14 Q. Would you not agree that a tan
15 four-door sedan is consistent with the
16 description of John French's car that was
17 reported stolen on the evening of Theresa
18 Fusco's disappearance?

19 MR. SEPE: Objection to form.

20 THE WITNESS: Well, according to
21 this, it's a four-door sedan. I don't
22 know what color it was. It was an
23 Oldsmobile.

24 Does she say what kind of car it
25 is?



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2 I mean, it's a four-door sedan.

3 This says it has a black top. She says
4 it's tan or something.

5 MR. SCHECK:

6 Q. It says, "A large, light to medium
7 tan car."

8 A. Right.

9 Q. We'll show you pictures of this
10 car, okay?

11 A. Okay.

12 Q. But just to have it in mind, would
13 you not agree that her description of the
14 car, right, is consistent with the
15 description, certainly, given of John
16 French's car, the one that was stolen?

17 A. Except for the black top.

18 (Plaintiffs' Exhibit 212, color
19 photograph, marked for identification, as
20 of this date.)

21 MR. SCHECK:

22 Q. I'm showing you what we've marked
23 Exhibit 212 for this deposition, and I
24 represent to you that that is a photograph of
25 the French car --



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2 A. Okay.

3 Q. -- after it was recovered.

4 Do you see that?

5 A. I do.

6 Q. Would you not agree that that car,
7 in appearance, would be consistent with the
8 description that Debbie Smith gave of seeing
9 a tan car, a four-door sedan at the
10 intersection?

11 MR. SEPE: Objection to form.

12 THE WITNESS: I, personally, I
13 don't think so.

14 MR. SCHECK:

15 Q. You don't think that looks tan?

16 A. I think it's got a black top, and I
17 don't know about the tan. That might be very
18 subtle, but, certainly, it has a black top.

19 I didn't hear her mention anything about
20 that. Correct me if I'm wrong. This is the
21 first time I've seen this in a long time, if
22 ever.

23 Q. I think her description here was
24 light to medium tan car.

25 A. Right.



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2 Q. Are you telling me that you don't
3 think that photograph can fall into the
4 category of light to medium tan?

5 A. Not the top.

6 Q. I didn't ask about the top.

7 A. The top is part of car, Mr. Scheck.
8 You want to ask me that question, the body
9 has a color that could be interpreted as tan,
10 but the top doesn't.

11 MR. SCHECK: Let's mark this
12 photograph as 213.

13 (Plaintiffs' Exhibit 213, color
14 photograph, marked for identification, as
15 of this date.)

16 (Plaintiffs' Exhibit 214, color
17 photograph, marked for identification, as
18 of this date.)

19 (Plaintiffs' Exhibit 215, color
20 photograph, marked for identification, as
21 of this date.)

22 MR. SCHECK:

23 Q. I see you reading ahead in

24 Ms. Smith's statement, Mr. Klein.

25 So far would it be fair to say that you



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1 Klein
2 don't have a specific or general recollection
3 of knowing about this statement before the
4 trial?

5 A. I don't recall this statement.

6 Q. I'm showing you what I showed you
7 before, which is Exhibit 212, which is
8 French's car that I think you agreed at least
9 the body of it could be described as light to
10 medium tan, and I'm showing you now
11 Exhibit 213, which is a photograph of the
12 windshield, and 215, which is also a
13 photograph of the windshield, but it has a
14 sticker here, "Evidence, Do Not Touch." And
15 I use that to suggest to you that you might
16 want to look at all three photographs
17 together.

18 And what I'm going to ask you is would
19 you not agree that these photos of the French
20 car indicate a front windshield which has
21 been damaged?

22 A. I see what you're asking me to do.
23 I can't see, unless you point it out to me, I
24 can't see that these pictures are necessarily
25 the front windshield.



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2 I know what you're saying, that you've
3 got this sticker there. They don't even look
4 the same to me.

5 Isn't there something else describing
6 what this is a picture of that might be more
7 specific?

8 Q. We represent to you that these are
9 pictures of the French car.

10 A. I know, but as to what windshield,
11 what window this is, I can't make the
12 connection between the front windshield.

13 Q. Well, you're telling me that
14 looking at these pictures, you're still
15 uncomfortable as to whether or not the front
16 windshield of this car was shattered.

17 Is that what you're telling me?

18 A. I can't make the connection between
19 the two pictures, the close ups and the
20 overall picture of this car.

21 MR. SEPE: Can we go off the
22 record?

23 (Discussion held off the record.)

24 (Recess taken.)

25 MR. SCHECK:



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2 Q. The lawyers all had a discussion
3 about the way these questions are being asked
4 and reasonable people may disagree with this,
5 but I'm not trying to quarrel with you.

6 You understand that?

7 A. I hope so.

8 Q. Let me show you Exhibit 214 here,
9 and I represent to you that this is a
10 photograph taken from the scene where Theresa
11 Fusco's body was discovered, and there is a
12 blanket in that photo.

13 Do you see that?

14 A. I don't see a blanket that's
15 observable. I see things.

16 Q. Do you see something in there that
17 looks like a blanket?

18 A. No.

19 Q. Do you see something that appears
20 to be woven and is white and appears to be
21 black and blue and orange?

22 A. Are you saying that this is one
23 item?

24 Q. Yes.

25 A. I can't even see that that is one



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2 item.

3 Q. That photo doesn't do anything for
4 you as to whether a blanket was recovered at
5 the scene?

6 A. No.

7 Q. I think where we left off was
8 looking at 159, which is the statement of
9 Debbie Smith.

10 And she says, "I looked inside, and I saw
11 a lot of stuff in the back seat. I think
12 there were tools and a blanket and other
13 stuff in the back seat. During this time, I
14 got out of my car, and I looked around the
15 railroad trestle."

16 A. "Toward the railroad trestle."

17 Q. "I looked around toward the
18 railroad trestle." Thank you.

19 "I looked at the license plate. I
20 remember there were four numbers and three
21 letters and a shiny sticker on the left
22 side."

23 A. Shiny or skinny, because it has two
24 Ns in it?

25 Q. "Skinny," would that be better to



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2 you?

3 "A skinny sticker on the left side of the
4 bumper. I also remember that the car had a
5 broken windshield and a ticket in the left
6 front window on the dashboard. Today I
7 received a phone call from Detective Joseph
8 Volpe who asked me to come to police
9 headquarters and view a car that they had
10 there. I met with Police Officer Lane and
11 Detective Pierce who showed me a 1971
12 Oldsmobile Delta 88, and I have looked at the
13 car. I feel that this is the car that I saw
14 that night. The only reservation that I have
15 is that the interior of the car does not have
16 all the stuff in it that the car had when I
17 had stopped by the railroad crossing. I have
18 given this statement to the detectives, and
19 it is the truth."

20 Do you see that?

21 A. Yes, sir.

22 Q. So would you not agree that what
23 this police report reflects in an objective
24 matter is that this witness who was at the
25 intersection near where the body was



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2 recovered and heard a scream saw a car that
3 she's saying is the French car with the only
4 reservation being that it doesn't have all
5 the stuff she saw in the car, correct?

6 MR. SEPE: Objection to form.

7 THE WITNESS: Do I answer?

8 MR. SEPE: Yes.

9 THE WITNESS: That's what she
10 appears to be saying.

11 MR. SCHECK:

12 Q. Other than the fact that it doesn't
13 have the "stuff" that she describes in the
14 car when she stopped, she's saying this
15 French car is the car; fair enough?

16 MR. SEPE: The objection now is
17 he's being asked to agree that the
18 witness is saying --

19 MR. SCHECK: No, I'm not asking him
20 to say. I'm asking what this document
21 shows.

22 MR. SEPE: Right, and he's being
23 asked to agree with the document that the
24 witness is saying that it's the French
25 car. That's my objection.



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MR. SCHECK:

Q. Let me do it this way --

A. I know where it is. I'll just reread it. She's saying this car that she's looking at in the ESB is the car that I saw that night. That's what she's saying.

Q. That car, as you've seen from the documents that we've reviewed here, was the French car; fair enough?

A. No.

Q. You have some question in your mind as to whether or not the car that she was taken to see was the car that French reported stolen and was eventually recovered?

A. No. I'm not saying that the car that she saw under the intersection was the French car that was stolen. It seems pretty likely that the car that she was shown in ESB is the French car.

Q. That's what question I asked you. I'm sorry. We may be misunderstanding each other.

Is there any doubt, from looking at this police report and looking at the other police



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2 report, that as an objective matter, that
3 this witness is saying that she feels that
4 the French car is the car that she saw that
5 night?

6 MR. SEPE: Objection to form.

7 THE WITNESS: That's fair.

8 MR. SCHECK:

9 Q. It would be fair to say that when
10 she's saying that the French car is the car
11 that she saw that night, she indicated from
12 the beginning that the car she saw had a
13 broken windshield?

14 A. You know, you're testing me. I
15 don't know if she said that in her first
16 report or not.

17 If you say she did, I'll agree with it.
18 I don't want to belabor this, but I'm
19 looking. I'm trying to see if that was in
20 her initial report.

21 Q. There's an indication when she got
22 to ESB that she stated she remembers the
23 broken windshield in the car.

24 MR. SCHECK: I'll withdraw that
25 question and move on.



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MR. SCHECK:

Q. You would agree that any objective reading of these police reports is you have a witness who indicates that she was at the intersection near the area where the body was recovered, true?

A. True.

Q. That she heard a scream coming from her left, would be in the direction where the body was recovered, true?

A. True.

Q. That she saw the French car by the railroad tracks?

A. That I don't know.

Q. Well, she saw the French car --

A. Your description of her seeing the French car is what I'm disputing.

Q. She saw a tan car that she later identified to be the French car?

A. Yes.

Q. By the railroad tracks; fair enough?

A. Okay.

Q. Based on putting these reports



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2 together as an objective matter, would you
3 not agree that based on your knowledge of
4 investigate practices by homicide detectives
5 and DAs working homicide cases in 1986, that
6 this statement by Debbie Smith and her
7 assertion that the French car was at the
8 scene near where the body was recovered would
9 be a reasonable investigative lead to pursue?

10 MR. FREEMAN: Objection.

11 THE WITNESS: Again, it depends,
12 but -- it depends.

13 MR. SCHECK:

14 Q. Well, based on what we've seen so
15 far, given what was known, let's say, by
16 December 9th, 1986, in this investigation,
17 would you not agree that this was a
18 reasonable investigative lead for a homicide
19 detective or a prosecutor to pursue that
20 Debbie Smith may have overheard Theresa Fusco
21 screaming and seen the car that was used to
22 abduct her?

23 MR. SEPE: Objection to form.

24 THE WITNESS: I would say that,
25 based upon what we've discussed, I would



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2 want to know the accuracy and credibility
3 of Debbie Smith.

4 MR. SCHECK:

5 Q. Right, but based on what you've
6 heard so far about what she saw, it would be
7 a reasonable investigative lead to pursue?

8 MR. SEPE: Objection to form.

9 THE WITNESS: I'm having a hard
10 time just answering that other than it
11 depends, you know. What I said is I
12 would take a look and see if this woman
13 is accurate and credible.

14 MR. SCHECK:

15 Q. Right, because if this woman were
16 accurate and credible, that would be an
17 important lead?

18 A. It would certainly be something to
19 look into.

20 Q. And so far you have, again, no
21 general or specific recollection of any of
22 the information of the documents that we've
23 gone over so far?

24 A. You know, I know you raised this in
25 this phone call that we've had, and I've



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2 discussed it since then, but I can't say
3 whether I knew about this back in '85 or '86
4 or not.

5 Q. But as you sit here today, other
6 than when I first raised this with you in
7 2009, right, you didn't remember it?

8 A. When you first brought it to my
9 attention, it didn't ring a bell.

10 Q. Let's turn to 161.

11 Would you not agree with me that one
12 reason that the Debbie Smith report and her
13 identification of French's car bears further
14 investigation as a reasonable investigative
15 lead as of 1986 is that the car was reported
16 stolen by French at or around the time that
17 Theresa Fusco was last seen, true?

18 A. Let me just check.

19 Q. You can double check that.

20 A. Yeah, assuming November 10th is the
21 date that she was last seen, that's the date
22 he reports it as missing.

23 Q. In and around the time that she was
24 last seen alive?

25 A. I would say in that range, yeah,



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2 but that's not, well --

3 Q. You would agree, from the point of
4 view of standards of 1986, investigative
5 standards, the fact that French's car was
6 reported stolen, right, on the night that
7 Theresa Fusco disappeared and that Debbie
8 Smith is identifying French's car as the one
9 she saw by the side of the road when she
10 heard a woman scream in and around the area
11 where Theresa Fusco's body was ultimately
12 recovered, that coincidence is yet another
13 reason why this Debbie Smith report would
14 bear further investigation?

15 A. Depending upon a number of other
16 factors.

17 Q. Well, can you think of any reason
18 that Debbie Smith would know that French's
19 car was stolen?

20 MR. SEPE: Objection to form.

21 THE WITNESS: I don't know.

22 You want me to answer that?

23 MR. SEPE: You can. If it's form,

24 you can.

25 MR. SCHECK:



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Q. I'm withdrawing it.

A. He withdrew it.

Q. Why don't we turn to 161, and you'll see that 161 says on it, "December 6th, 1984."

Do you see that?

A. Yes.

Q. That's three days before Debbie Smith comes forward, correct?

A. Yes.

Q. That's one day after Theresa Fusco's body was found?

A. Again, if you say it was found on the 5th of December, I'll accept that. I don't remember it.

Q. It says, "December 6th at 1840 hours."

So that would be 6:40 p.m., yes?

A. Yes.

Q. "Present at 58 Broadway, Malverne, New York home of John T. French. He stated that on November 10th, 1984, his 1971 Oldsmobile sedan registered 5233 BJN, New York, his car was parked on the southwest



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corner of Lakeview Avenue and Ocean Avenue.

It was stolen sometime between 23 --

A. I'm not following.

Is this the same thing that you're
reading, from this?

Q. Yes.

A. Then I had a problem. I'm sorry.
I just blanked out.

Q. Do you want me to read it again?

A. Yeah, please. Sure.

I mean, I see the name and address.

"His car was parked on southwest corner."

Q. "Southwest corner of Lakeview
Avenue and Ocean Avenue. It was stolen
sometime between 2100 and 2305 hours that
date."

Take a look at Number Three on the
exhibit, and you see the area where it's
reported John French's car was stolen?

A. Right.

Q. Do you have that in mind?

A. Yes, sir.

Q. Let's go back. "On November 18th,
'84, Mr. French went out looking around for



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2 his car. He entered Lakeview, and he found
3 it parked on Woodfield Road near the railroad
4 tracks. He then got his keys and drove the
5 car to Lynbrook PD."

6 Do you see that?

7 A. Yes.

8 Q. I think we've reviewed that before,
9 but on our diagram, Number Six, is the
10 location where John French reported finding
11 his car.

12 Do you see that?

13 A. Yes.

14 Q. It says here in this statement,
15 "Prior to going to the PD, his sister Laurie
16 found a pair of ladies blue jeans with
17 stripes. Blue jeans were (inside-out).
18 Jeans were found on right rear floor board
19 halfway under right passenger seat."

20 Do you see that?

21 A. Yes, I do.

22 Q. Would you not agree that Theresa
23 Fusco was last scene wearing striped blue
24 jeans?

25 A. Again, this document says that.



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2 Q. So when you say this document,
3 we're referring to Exhibit 168, which is a
4 missing poster for Theresa Fusco?

5 A. It appears to be.

6 Q. This says that, this Exhibit 161,
7 French says that his sister found ladies blue
8 jeans with stripes inside out.

9 Do you see that?

10 A. Yes.

11 Q. And the jeans were found on the
12 right rear floor board halfway under the
13 right passenger seat?

14 A. Okay.

15 Q. You've got that in mind?

16 A. Yes.

17 Q. And he's giving this statement on
18 December 6th, three days before Debbie Smith
19 comes forward and says that she saw French's
20 car at the location where Theresa Fusco's
21 body, near the location where her body was
22 ultimately found, true?

23 A. Yes, that's what it says.

24 Q. Do you have any general or specific
25 recollection of being told that ladies



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2 striped blue jeans were found in a car that
3 was reported by a witness to be near the
4 scene of where Theresa Fusco's body was
5 recovered?

6 A. No.

7 Q. And you're clear about that one,
8 right?

9 MR. SEPE: When you say you're
10 clear about that one, you're repeating
11 the last question?

12 THE WITNESS: I'm as clear about
13 that as I am about everything.

14 MR. SCHECK:

15 Q. As an objective matter, would you
16 not agree that finding striped ladies blue
17 jeans consistent with a description of the
18 clothing that was last being worn by Theresa
19 Fusco inside out within a vehicle that one
20 witness says was near the scene of where the
21 body was recovered is a significant
22 investigative fact to pursue, as of 1986,
23 sometime after Theresa Fusco's body was
24 recovered?

25 A. Yes.



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2 Q. And that would be because if it
3 turned out that from an examination of the
4 jeans, whether it be by size or finding hairs
5 or other kind of evidence in the jeans, that
6 the jeans in the French car were Theresa
7 Fusco's jeans, that would be an extremely
8 significant investigative fact, wouldn't it?

9 A. If the jeans from these notes were
10 Theresa Fusco's jeans?

11 Q. Yes.

12 A. Yeah, that would be significant.

13 Q. That would be a big deal, wouldn't
14 it?

15 A. It certainly would.

16 Q. This is a report that was given the
17 day after the body was found, right?

18 A. To who?

19 Q. This police report --

20 A. Right. I don't know what this is.
21 I don't know who wrote it. I don't know
22 whether it's police or not. The only thing,
23 IMP on the top would indicate it was.

24 Q. What is IMP?

25 A. Impound. That's what it means to



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2 me, but this is somebody's notes.

3 Q. I represent to you --

4 A. I don't know if this is a police
5 document or not.

6 Q. Well, I represent to you that we
7 found this in the homicide file.

8 A. Okay.

9 Q. And if it were found in the
10 homicide file --

11 A. The original or a copy?

12 Q. Good question.

13 A. Thank you.

14 Q. Well, given the form of Plaintiffs'
15 161, right --

16 A. This?

17 Q. Yes, the one we've just gone over,
18 and the fact that it was found in the
19 homicide file, based on your knowledge of the
20 customs and practices of the homicide
21 division in 1986, would you expect that this
22 document was written by some police officer?

23 MR. SEPE: Objection to form.

24 You can answer.

25 THE WITNESS: I think that's a



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2 reasonable guess, but I could think of
3 other alternatives too. What I would say
4 is it's obviously something that the
5 police should have been aware of if it's
6 in their file, whether they wrote it or
7 not.

8 MR. SCHECK:

9 Q. Whoever wrote this, it should
10 certainly be, I think we agreed on this, a
11 big deal if the striped jeans found in the
12 French car, which was stolen in or around the
13 time that Theresa Fusco was last seen, turned
14 out to be Theresa Fusco's jeans?

15 A. I think you're understating it.

16 Q. I would never want to understate
17 this.

18 How would you describe the importance of
19 that?

20 A. We found the victim's jeans in a
21 car that had been stolen the day she was
22 abducted?

23 Q. Yes.

24 A. If all that is true, I would say
25 that's, you know, I can put it into a lot of



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2 different words. A big deal wouldn't be one
3 of them. I would say it's a significant
4 development in the case.

5 Q. You mean big deal is not strong
6 enough?

7 A. Right.

8 Q. Give me, for the sake of the
9 strongest possible description of importance.

10 A. It's a significant development.

11 Q. Would it be fair to say that if it
12 were Theresa Fusco's jeans that were found in
13 the French car, a car that was stolen the
14 night of the incident, that that would be in
15 direct contradiction to the theory of
16 prosecution that you used at the Restivo,
17 Kogut and Halstead trials?

18 A. No.

19 Q. It wouldn't be?

20 A. The way I understand it, no. I'm
21 not saying it wouldn't have been helpful, but
22 a direct contradiction, no.

23 Q. It certainly would have been --

24 A. I don't want to fence with you
25 about it. I don't know when those jeans



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would have been placed in that car. We never found her clothing.

Could some guy have found it later on, you know, that's how I understand this information you're giving me right now, that as of November 18th, that's when he supposedly found striped jeans, or his sister supposedly found striped jeans in the car turned inside out.

Q. Right.

A. Does that directly contradict that on November 10th, somebody else murdered and raped her, disposed of her pants, and this guy, who may very well have been, you know, a junk collector or whatever picked them up.

Q. Who is the junk collector?

A. I don't know, this fellow French with the car with all the junk in it that the woman saw. All I'm saying is it's not directly contradictory.

Is it a big deal, as you put it?

Yes, but it doesn't, to me, directly contradict our case.

Q. I'm just trying to --



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2 A. You know, I don't want to fence
3 with you. I'm telling you it's a significant
4 development, but I don't agree with you that
5 it's directly contradictory.

6 Q. So you're suggesting now that it
7 might somehow be possible that Restivo,
8 Halstead and Kogut abducted Theresa Fusco in
9 Restivo's van, raped and murdered her, buried
10 her body, and that somebody found her striped
11 jeans at or around the area where she was
12 raped and murdered and put them under the
13 rear passenger seat of the French car?

14 A. I don't know when those jeans were
15 discovered, where those jeans were
16 discovered. First of all, her body was not
17 buried.

18 It was just covered with wood. There was
19 no hole dug to bury her.

20 Q. Covered in leaves.

21 A. Yes, but not buried. Do I think
22 that's possible, yes. Would I have looked
23 into it, absolutely.

24 I've had a lot of cases where people have
25 been found with things that didn't belong to



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2 them, but they weren't the killer.

3 Q. Would it be fair to say that you
4 agree that it would be a big deal and
5 significant development, but it wouldn't be
6 "directly contrary" to the theory that you
7 used in the prosecution of Restivo, Halstead
8 and Kogut; is that right?

9 A. That's right.

10 Q. Would you not agree that it would
11 have been a significant problem for the
12 prosecution that you would have to overcome
13 at trial?

14 A. I can't agree with your
15 characterization of it as a problem.

16 Q. Let me ask you this --

17 A. You know, and if you're looking at
18 it back in 1985 and 1986, we didn't have DNA
19 results at the time. So to look at it now,
20 with everything that's existing, and looking
21 at it then, you're looking at apples and
22 oranges.

23 To say back then would I have looked at
24 it as a problem, I would say not necessarily.

25 MR. SEPE: I'm sorry, Barry, before



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you ask your next question, the objection to the line of questioning is as follows: as we talked about off the record, when you're asking a witness, especially a fact witness, to give an opinion on whether something is consistent with something else, none of which he has any information on, whether something is a reasonable inference, causes problems because ultimately you're asking him to opine on the ultimate factual issues of the case.

As an example, before the break --

MR. SCHECK: Mike --

MR. SEPE: Let me just finish the objection.

MR. SCHECK: If you're going to make this objection, I don't think we should have him in the room listening to it.

MR. SEPE: No, strictly in terms of the form of the questions, before the break, the witness is shown, reasonably, Exhibit 212, which is the front of the



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2 car.

3 The witness is then asked to look
4 at what is purported to be a close-up of
5 the front of the car to go to the
6 ultimate question of whether holes or
7 breaks in windshields match, and a
8 cursory inspection reveals it's actually
9 the rear windshield. I'm finishing up
10 here.

11 The problem is that when you get
12 into these questions, you wind up
13 innocently mischaracterizing evidence
14 unintentionally and creating problems for
15 the witness and the entire case. That's
16 just an example of what I mean in my
17 objection.

18 MR. SCHECK: I understand. The
19 term "ultimate issue" here, right, I take
20 some, I would resist that, but I take
21 your objection; but I'm really trying to
22 restrict myself to just facts, and let me
23 see if I can recapitulate here, because I
24 think Mr. Klein has told us something
25 that you wouldn't object to or maybe



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didn't object to.

MR. SCHECK:

Q. And that is that in terms of your understanding of investigative procedures of prosecutors and homicide detectives in 1986, you agree that if Theresa Fusco's jeans had been found in the French car that was reported stolen that night, that would be a very big deal?

A. Yeah, I said stronger words than that, but I agree with you.

Q. Very significant, correct?

A. Yes.

Q. I take it that at the time of this trial in 1986, you were familiar with your obligations under what's sometimes called the "Brady Case" to disclose information to the Defense?

A. Surely.

Q. And you were complying with those obligations?

A. Yes.

Q. And you recall a case that was, I think, decided in 1975 or certainly before



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2 this trial called People versus Consolazio?

3 A. I remember the name.

4 Is that the one that dealt with district
5 attorney's notes?

6 Q. Yes.

7 Do you also recall that in the Consolazio
8 case the New York Court of Appeals suggested
9 that if a prosecutor were in any doubt as to
10 whether certain information was Brady
11 material that should be disclosed to the
12 Defense, then they should show it to the
13 Judge for in camera review?

14 MR. SEPE: Objection to the form of
15 the question as it asks the witness for a
16 legal determination.

17 That being said, you can answer.

18 THE WITNESS: I know that's been
19 said in several cases, whether it's that
20 particular one or not.

21 MR. SCHECK:

22 Q. I'm only ascertain --

23 A. I recognize that as one of our
24 obligations.

25 Q. You recognize that in 1986?



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2 A. Yes.

3 Q. So to put it simply, in 1986, you
4 would comply with your Brady obligations to
5 disclose material to the Defense?

6 A. Yes.

7 Q. And if you had any doubt as to
8 whether certain information was Brady or not,
9 you would show it to the Judge to decide
10 whether it should be disclosed?

11 A. To be fair, I guess it would depend
12 on the level of the doubt.

13 Q. In other words, it would depend on
14 the level of doubt. You're probably just
15 better to leave it at that.

16 MR. SCHECK: We're looking for a
17 document here, just for your information,
18 we'll show it to you, that the Lynbrook
19 Police threw away the striped jeans that
20 were in the car before they could be
21 examined.

22 (Discussion held off the record.)

23 Given the time, we're looking for a
24 document, but for purposes of moving
25 forward, we're going to be going back on



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2 the record.

3 MR. SCHECK:

4 Q. I represent to you that the
5 Lynbrook Police, after they got the French
6 car, threw away the striped jeans that were
7 found inside out under the right passenger
8 seat.

9 A. You know this?

10 Q. Yes.

11 A. They said they were striped jeans?

12 Q. Yes.

13 A. The Lynbrook Police acknowledge
14 they found striped jeans in this guy's car
15 and they threw them away?

16 Q. Yes.

17 And given the sequence of events, you can
18 understand that they had no idea that the
19 French car was connected to the disappearance
20 of Theresa Fusco when they recovered it
21 November 18th, 1984?

22 A. I don't know that I can understand
23 that.

24 Q. Well, Theresa Fusco went missing on
25 November 10th, right?



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2 A. Right.

3 Q. Her body wasn't found until
4 December 5th.

5 This is a car reported stolen on the
6 night of her disappearance; fair enough?

7 A. Right.

8 Q. And the owner recovers it on
9 November 18th and drives it to the Lynbrook
10 Police Department?

11 A. Yeah.

12 Q. And then the striped jeans found in
13 the car are thrown away.

14 A. Okay.

15 Q. Have that in mind?

16 A. Yes.

17 Q. If a defense attorney knew about
18 the Debbie Smith statement; the French car
19 being stolen on the night of the incident;
20 the damage to the French car, the windshield;
21 and the report of French and his sister that
22 striped jeans were found inside out under the
23 passenger seat; and that the Lynbrook Police
24 subsequently threw away the jeans, you have
25 that all in mind?



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2 A. Yes, sir.

3 Q. Would you not agree that if a
4 defense attorney had all that in his or her
5 possession at the time of the Restivo, Kogut
6 or Halstead trial, that that would provide
7 the basis of a significant argument from the
8 defense point of view that Restivo's car had
9 not been used for the abduction and rape and
10 that Theresa Fusco's jeans had been thrown
11 away?

12 MR. SEPE: Object to form.

13 MR. FREEMAN: Objection.

14 This is the very problem, and it
15 makes it even clearer. You're asking him
16 to give an opinion of what a defense
17 attorney would do.

18 MR. SCHECK: I'll start another
19 way.

20 MR. SCHECK:

21 Q. I think we found Exhibit 62,
22 previously marked, and I'm calling your
23 attention to a police report from Detective
24 Doherty.

25 You knew Detective Doherty?



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2 A. No.

3 Q. A police report from Detective
4 Doherty that says, and first I'll read it to
5 you and then you can look at it, "On
6 December 23rd, Detective Bailey and I went to
7 the Lynbrook Police Department. There we
8 received information that a John French
9 reported his car stolen on November 11th from
10 Lakeview Avenue and Ocean Avenue. The car
11 was recovered on November 18th with different
12 plates on it by the owner in Lakeview. Blue
13 jeans that were found in the car were turned
14 in to the Lynbrook PD to Sergeant Sprague.
15 We saw Sergeant Sprague later that evening,
16 and he said that the pants were thrown into
17 the garbage."

18 A. Oh, I know, just from looking at
19 that document, I know who Doherty is. The
20 name didn't mean anything to me.

21 Q. Who is Doherty?

22 A. There was a missing persons
23 investigation of Theresa before her body was
24 found, very early on. He was one of the
25 missing persons detectives. That's why I



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2 didn't recognize the name, but I recognize
3 that document very quickly.

4 Q. You recognize this document?

5 A. Yes, I mean, just the format of it,
6 and I went over this, I believe.

7 Q. So from looking at just --

8 A. Oh, I'm sorry. I'm thinking of,
9 what's her name.

10 Q. Kelly Morrissey?

11 A. Kelly Morrissey. I shouldn't jump
12 in.

13 Q. So this particular document I'm
14 reading from, you have no specific
15 recollection of this document?

16 A. I know the format.

17 Q. You know the format of a missing
18 person's investigation?

19 A. Yeah, it looks like any detective's
20 262. Yeah, 262.

21 Just this page, you want me to look at
22 it?

23 Q. So the answer to the question is?

24 A. What's question?

25 Q. Do you have any general or specific



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2 recollection of seeing this document?

3 A. No.

4 Q. Do you have any general or specific
5 recollection of knowing the information that
6 I've just read to you?

7 A. No.

8 Q. Just to be clear, you have no
9 general or specific recollection of learning
10 that white striped jeans --

11 A. That doesn't say that.

12 Q. The report of what the police did
13 in Lynbrook says that blue jeans were thrown
14 away, correct.

15 A. The report you just showed me
16 indicates jeans or blue jeans, but it doesn't
17 say striped, which is a big difference to me.

18 Q. But the document I showed you
19 before, the interview with John French as to
20 what he and his sister found in the car,
21 that's Plaintiffs' 161.

22 Right, do you see that?

23 A. Yes, I do.

24 Q. That says that French saw, and his
25 sister Laurie found, a pair of ladies blue

Klein

jeans with stripes inside out under the right rear floor board halfway under the passenger seat, right?

A. I don't see where it says he saw it.

Q. This is an interview with French, correct?

A. Yes.

Q. He's talking about how he went and found the car?

A. That's true.

Q. And he's stating that his sister, Laurie, found this pair of blue jeans with stripes?

A. The sister, not him.

Q. I understand.

He's saying his sister found them, but he's saying that he knows that she found him, correct, it's his statement?

A. It doesn't say how she found them.

MR. SEPE: Objection to the form of the question.

MR. SCHECK:

Q. This document doesn't say as to



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2 whether or not he was actually present when
3 she found the striped blue jeans, correct?

4 A. Nor does he say he ever saw them.

5 Q. It doesn't say whether he was
6 present when his sister found the jeans,
7 correct; is that what you're pointing out?

8 A. No. What I'm pointing out is it
9 doesn't say that he ever saw those jeans,
10 even after his sister found them.

11 Q. But it doesn't say he didn't
12 either, correct?

13 A. No.

14 Q. And it certainly indicates that he
15 had knowledge that his sister found ladies
16 blue jeans with stripes, right?

17 MR. SEPE: Objection as to the form
18 of the question.

19 It might be better to let the
20 document speak for itself.

21 THE WITNESS: I don't know how he
22 knows that.

23 MR. SCHECK:

24 Q. On the face of the document he is
25 telling the Police that his sister found



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ladies blue jeans with stripes, right?

A. With stripes.

Q. And that the blue jeans were inside out, correct?

A. Correct.

Q. And that they were found on the rear floor board halfway under the passenger seat, correct?

A. Yes.

Q. And now we know that Lynbrook Police threw away blue jeans that were found in the French car, correct?

A. Does it say blue jeans or jeans?

Q. Let's look again for the benefit. It says, "Blue jeans," all right?

A. Okay.

Q. Based on the custom and practices of 1986 in the Prosecutor's Office, if you knew prior to the Restivo, Halstead and Kogut trials that there was a report indicating John French's sister had found a pair of ladies blue jeans with stripes in the French car, which had been stolen the evening of the incident, and that blue jeans from that car



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2 had subsequently been thrown away and that
3 there was a witness, Debbie Smith, who
4 indicated that she was at the intersection of
5 Rocklyn and Sunrise Highway, consistent with
6 the reports that we've seen, that we've
7 reviewed together, do you have that in mind?

8 A. Yes.

9 Q. If you knew all that information,
10 if you knew all that information, in 1986,
11 would you have considered turning that over
12 to the Defense as part of your Brady
13 obligation?

14 MR. SEPE: Objection to form.

15 You can answer.

16 THE WITNESS: I think that's a fair
17 statement, that I would have considered
18 it.

19 MR. SCHECK:

20 Q. This might fall into the category
21 of something that either you would have
22 turned over or at least given to the Judge
23 for in camera review?

24 A. Or not turned over.

25 Q. But it's something that you would



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2 have considered disclosing as Brady material?

3 A. That's fair.

4 Q. And would part of your decision as
5 to whether to disclose the Debbie Smith
6 statements and the French reports that we've
7 reviewed here, including the statement about
8 the blue jeans with stripes being found in
9 the car, would part of that determination
10 have turned on making an assessment of the
11 credibility of Debbie Smith and John French
12 and his sister?

13 MR. SEPE: Objection to the form of
14 the question.

15 THE WITNESS: To a certain extent,
16 it would, but it wouldn't be the only
17 factor I would consider.

18 MR. SCHECK:

19 Q. But to the best of your knowledge,
20 your specific and general recollection, you
21 don't remember ever having gone out and
22 conducted any kind of inquiry with Debbie
23 Smith, John French or John French's sister?

24 A. Me?

25 Q. Yes.



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2 A. Oh, I can say I never did.

3 Q. And you have no specific or general
4 recollection of, first, Detective Volpe ever
5 telling you about going out and conducting an
6 inquiry of Debbie Smith, John French or John
7 French's sister?

8 A. Just the same as before, I don't
9 remember. I mean, I can tell you I didn't do
10 it. That I remember.

11 Q. And the reason you can tell me that
12 is that these reports that we reviewed,
13 right, would have been, taken together, a
14 significant issue for you to pursue?

15 A. Yes, they would have, but I could
16 have seen them and not remember it now; but I
17 would not have interviewed these people and
18 not remembered it. That's just my own
19 personal opinion.

20 Q. You're saying that if you had
21 actually conducted the interviews, you would
22 have remembered it, that's what you're
23 telling us?

24 A. I hope so.

25 Q. And if you had specifically ordered



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2 Detective Volpe or anyone else connected with
3 the case to go out and interview these
4 witnesses, that's something you would have
5 remembered as well?

6 MR. SEPE: Objection to form.

7 THE WITNESS: I can't say.

8 MR. SCHECK:

9 Q. I'm only saying --

10 A. I can't say.

11 Q. There's certain things you can say
12 you remember and there's certain things you
13 have to tell us you just have no specific or
14 general recollection, right?

15 A. Correct.

16 Q. If you had directed Detective Volpe
17 or any other investigator connected with this
18 case to go out and follow up on Debbie Smith,
19 John French, John French's sister and the
20 issue of the striped blue jeans, would you
21 expect that there would be something in the
22 District Attorney's file reflecting that you
23 had so directed an investigation?

24 A. Not necessarily.

25 Q. That was not your practice to write



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2 down what you were doing?

3 A. Sometimes it was, sometimes it
4 wasn't. At this stage of my career, it
5 probably wasn't.

6 Q. And if you had directed an
7 investigation into Debbie Smith, John French,
8 and John French's sister, given the ordinary
9 customs and practices in 1986, would you have
10 expected that there would be some police
11 report or other document generated for you
12 about the results of such an inquiry?

13 A. It depends. Not necessarily would
14 there have been a report prepared.

15 (Continued on the following page.)
16
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Q. What does it depend on?

A. I guess the results of the investigation. I mean, if there's nothing different, then I doubt that there would have been anything added.

MR. FREEMAN: For the record, I think it's 4:30.

MR. SCHECK: You want to go now?

THE WITNESS: I would like to.

MR. SCHECK: Sure thing.

(Time noted: 4:30 p.m.)

FRED KLEIN

Subscribed and sworn to before me
this ___ day of _____ 2010.



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STATE OF NEW YORK)

) Ss.

COUNTY OF SUFFOLK)

I, JEAN VALERIE GAFA, a Notary
Public within and for the State of New
York, do hereby certify:

That FRED KLEIN, the witness whose
deposition is hereinbefore set forth, was
duly sworn by me and that such deposition
is a true record of the testimony given
by the witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage, and that I
am in no way interested in the outcome of
this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 25th day of August 2010.


JEAN VALERIE GAFA



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